No. 246

No. 5261.

FILED
AUG 1 1955
JOHN T. FEY, Clerk

United States Court of Appeals
For the First Circuit

WADELMIRO ARROYO,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

RECORD APPENDIX

TO

BRIEF FOR THE APPELLANT

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RELEVANT DOCKET ENTRIES.

1955

Jan. 26 Indictment filed (1 ct.) (Emilio Serra—foreman)

Mar. 11 Deft. waives reading of indictment and pleads "Not Guilty". Date of trial will be set lafer. Deft. released on bond on file.

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Dec. 18 Motion of deft. for a bill of particulars, filed.

21 Ct. hears statements of C.A. Romero Barcelo, Esq. and of R. Rodriguez Antongiorgi, and it appearing that the U.S. Atty. furnished the information requested, the motion is not passed upon.

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Jan. 3 Motion of deft. to dismiss filed.

3 Motion of deft. for postponement of trial till after 1/25/57 filed with exhibit A attached.

11 Hearing on mot. of deft. to dismiss had—denied.

Feb. 12 Motion of deft. to challenge the array, filed with exhibit A attached.

12 Case called for trial—jury empanelled. Motion challenging the array of petit jurors is argued and denied. Testimony on behalf of plff. heard and trial is cont'd to 2/13/57 at 9:30 A.M.

13 Exhibits 1, 2, 3, 4, 4A, 5, 5A, 5B, 7, 8, 9, 10, 11, 12 (ledger consisting of 5 sheets) 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, (7 documents) 24, (2 documents) for U.S. filed.

13 Trial resumed—further testimony on behalf of plff. heard at close of which deft. moves for judgment of acquittal which is argued and denied. Part of testimony on behalf of deft. heard and trial cont'd to 2/14/57 at 9:30 A.M.

14 Trial resumed — testimony on behalf of deft. heard at close of which R. V. Perez Marchand

1957

renews his motion for judgment of acquittal which is argued and denied. Argument of counsel and instructions of the Ct. on the law of the case heard and jury retire to consider its verdict. Jury returns verdict of "Guilty". Pronouncing of sent. cont'd pending any motion which deft. may file Deft. allowed to remain at liberty under the bond on file.

14 Plaintiff's request for special instructions, filed.

14 Deft's. request for special instructions to jury, filed.

14 Verdict filed.

19 Motion of deft. for acquittal "non obstante veredicto", filed.

19 Motion of deft. in arrest of judgment, filed.

Mar. 1 Hearing on motions for acquittal "non obstante veredicto" and in arrest of judgment had and denied. Imposition of sentence cont'd pending pre-sent. rept.

Apr. 12 Deft. appears for sentence sentenced to imprisonment for 9 months and to pay fine of $2,000. Amount of bond set at $1,000 deft. to remain at liberty until 4/18/57 proper motion to be filed.

15 Tendered by Wadelmiro Arroyo $2,000.00.

17 Bond on appeal filed and Approved 4/22/57.

22 Duplicate Notice of Appeal and Statement of docket entries mailed to U.S. Ct. of Appeals.

May 23 Three transcripts of court reporter filed (Re: trial)

June 5 Transcript of court reporter filed (Re: Motion for a Bill of Particulars. — Motion to Dismiss Indictment — Motion for acquittal non obstante veredicto and in arrest of judgment).

INDICTMENT.

The Grand Jury charges:

1. At all times hereinafter referred to, Local 1781 was a labor organization of the International Longshoremen's Association, formed of workers of the factory, refinery, and other branches of the sugar industry in the island of Puerto Rico, an industry affecting interstate commerce, within the meaning of the Labor Management Relations Act of 1947, as amended.

2. At all times hereinafter referred to, the Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., employers within the meaning of the Act referred to above, are and were corporations engaged in the processing of sugar cane into sugar in the island of Puerto Rico, an industry affecting interstate commerce.

3. At all times hereinafter refrred to, WADELMIRO ARROYO was President of said Local 1781, the labor union referred to above, and as such was the representative of employees of the Puerto Rican American Refinery, Inc. and Central Mercedita, Inc., as hereinafter alleged, said employees being engaged in an industry affecting interstate commerce, within the meaning of the Act referred to above.

4. On or about February 24, 1953, at Ponce, Puerto Rico, within the district of Puerto Rico and within the jurisdiction of this Court, the defendant, WADELMIRO ARROYO, did wilfully and unlawfully receive from the said Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., a sum of money in the amount of FIFTEEN THOUSAND DOLLARS ($15,000.00), which sum was not received by him as compensation for or by reason of his services as an employee of such employers; nor in satisfaction of a judgment of any Court or a decision or award of an arbitrator or impartial chairman, or in compromise, adjustment, settlement or release of any claim, complaint, grievance or dispute; nor with respect to the sale or pur-

chase of an article or commodity at the prevailing market price in the regular course of business; nor with respect to money deducted from the wages of employees in payment of membership dues in a labor organization; nor was such sum of money received as a payment to a trust fund established by the defendant or any other representative of such employees for the sole and exclusive benefit of the employees of said employers, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) for the purpose of paying for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activities or insurance to provide any of the foregoing, or of employees' benefits or life insurance, disability and sickness insurance, or accident insurance, in violation of the Act referred to above.

(29 United States Code, Section 186(b) and (d)).

True Bill

(s) illegible

Foreman

(s) RUBEN RODRIGUEZ ANTONGIORGI
United States Attorney

(s) LUIS DOMINGO MIRANDA
Assistant United States Attorney

Dated: January 26, 1955.

MOTION FOR A BILL OF PARTICULARS.

Comes, WADELMIRO ARROYO, the above named defendant, by his undersigned counsel, and unto this Honorable Court shows as follows:

That the indictment is so general and wanting in the language of the charge that it is clearly insufficient, if not misleading.

That as the indictment now reads the defendant is unable

properly to prepare for his defense on the merits and in order to avoid risking a waiver of his right "to be informed of the nature and cause of the accusation" (6th Amendment) defendant respectfully requests that the prosecuting attorney provide and serve him with the following particulars of his charge:

1. Whether the sum of money which the indictment charges defendant to have unlawfully received, was requested by and received by the defendant in one lump sum.

2. Whether said sum was received by the defendant in one or more negotiable instruments, or partly in money and partly in other things of value.

3. Whether the amount which defendant is charged to have received was given to defendant for himself, or to deliver to others.

4. Whether said amount was delivered to the defendant in cash or in checks, made payable to bearer or to any specific person or legal entity, and if they were made so payable to any specific person or legal entity, to whom were they made so payable.

WHEREFORE: Defendant respectfully prays that the premises considered, this Honorable Court enter the proper order under Rule 7(f) of the Federal Rules of Criminal Procedure, to the end that proper justice be done to the defendant.

At San Juan, Puerto Rico, this 17th day of December, 1956.

PEDRO M. PORRATA
ROMERO BARCELO & HERRERO FRANK
By (s) CARLOS A. ROMERO BARCELO
Attorney for Defendant
Office at Ave. Ponce de Leon
1023, esq. Roble, Rio Piedras
P.O. Box 1278, Rio Piedras
Puerto Rico.

HEARING ON MOTION FOR BILL OF PARTICULARS.

The hearing in the above entitled case on the motion for bill of particulars was held before the HONORABLE CLEMENTE RUIZ NAZARIO, sitting at San Juan, Puerto Rico, at 9:30 in the morning on December 21, 1956; the United States being represented by Ruben Rodriguez Antongiorgi, Esquire, United States Attorney, and the defendant being represented by Carlos Romero Barcelo, Esquire.

Mr. Romero: The fourth count of the indictment reads as follows:

"4. On or about February 24, 1953, at Ponce, Puerto Rico, within the district of Puerto Rico and within the jurisdiction of this Court, the defendant, Wadelmiro Arroya, did wilfully and unlawfully receive from the said Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., a sum of money in the amount of FIFTEEN THOUSAND DOLLARS, which sum was not received by him as compensation for or by reason of his services . . ." etc.

Your Honor, the statement that Wadelmiro Arroyo received the amount of money in the amount of $15,000.00 we have asked our distinguished brother to clarify by a bill of particulars, because we consider that the statement does not inform the accused of the transaction that was carried on, and he is not prepared to meet the accusation at the trial, and in order to prevent his waiver of his right to defend himself in that the prosecution might bring up a variance for which the accused isn't prepared, we have asked a bill of particulars from the United States Attorney. Your Honor, in *American Jurisprudence*, page 646, Volume 27, it says,

> "It is essential both at common law and under the statutes, where money or currency is the subject matter of the offense, that the description thereof, whether particularized or general, must be such as sufficiently

to inform the accused of the money or currency forming the subject matter of the offense charged against him."

Further on, in *American Jurisprudence*, Volume 27, it says,

"As the courts have pointed out, the words of the statute may be sufficient to describe or legally characterize the offense denounced,"—as in this case—"and yet be wholly insufficient to inform the accused of the specific offense of which he is accused, so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all of its essential elements. In such a situation the statutory words must be supplemented by other allegations which clearly and accurately set forth every ingredient of the offense with such precision and certainty as to leave no doubt in the minds of the accused and the court as to the exact offense intended to be charged. An information charging an offense in the words of a statute which defines an offense generally is insufficient where it alleges the offense in the language of the statute, but does not state the specific acts on which the charge is based and is not sufficiently definite to be of any value as a bar to further prosecution. In order to particularize the offense it is necessary in some instances, in addition to the statutory words of general description, to set forth the things or means used or other statement of facts and circumstances, as with respect to time, place, person, or other circumstances to identify the particular transaction . . ."

We have asked a bill of particulars with respect to the transaction and have asked the prosecuting attorney to furnish with the following data: "1. Whether the sum of

money which the indictment charges defendant to have unlawfully received, was requested by and received by the defendant in one lump sum. 2. Whether said sum was received by the defendant in one or more negotiable instruments, or partly in money and partly in other thing of value. 3. Whether the amount which defendant is charged to have received was given to defendant for himself, or to deliver to others. 4. Whether said amount was delivered to the defendant in cash or in checks, made payable to bearer or to any specific person or legal entity, and if they were made so payable to any specific person or legal entity, to whom were they made so payable."

The Court: Don't you think that those are facts peculiarly within the knowledge of the defendant, whether he has received $15,000.00 or not, and how he received the $15,000.00, in checks or currency, or whether the checks were payable to him or to somebody else? Those are facts peculiarly within his knowledge. And I believe that an indictment is not subject to a bill of particulars when the facts shown to be particularized are facts peculiarly within the knowledge of the defendant. That is, if the $15,000.00 were delivered to someone else, then he has the right to know how this money was delivered to that somebody else, whether in a lump sum or partial amounts, whether it was in checks, currency, or other form of payment, whether the checks were payable to that third person or to the defendant, or to somebody else, etc. But if it is alleged that he himself received the $15,000.00 that's a fact peculiarly within his own knowledge. He may say, "I did not receive the $15,000.00", or he may say, "I received only $7,000.00," or "I received $1,500.00 or $300.00. I did not receive that money for myself, I received it in checks for such-and-such person or entity" because the bill of particulars is to enable the defendant to defend himself. Of course, there is no doubt that if a defendant is charged with having received

a sum of money, he may be able to say whether he received it or not.

Mr. Romero: We are aware of the fact that the knowledge might be in the defendant, but the defendant isn't aware of what the United States Attorney is trying to prove, whether the defendant received money. If the defendant in fact received checks, then the defendant would be ready to defend himself that he did not receive money, but if he says he received checks he would not be prepared for that.

The Court: And do you believe that checks are not money?

Mr. Romero: One thing, if a man received money and not checks, then in another future case it could be brought up against him he received checks, because those are two different situations. Or whether there was one particular situation. And the defendant isn't prepared to meet the facts because he does not have sufficient knowledge of what the United States Attorney is trying to prove.

The Court: If that is so, that the defendant believes checks are not money and he received checks, he can defend himself, he can say "I did not receive money, all I received was a lot of papers payable at such and such a bank, which are not money."

Mr. Rodriguez Antongiorgi: This indictment is much more informative.

The Court: If you want to give the particulars, I don't need to say anything.

Mr. Rodriguez Antongiorgi: This is much more informative than the one Your Honor upheld in the *Mejias* case, because we are alleging all the facts of the statute. And all the statute prohibits is receiving anything of value, and we are saying here, an amount of $15,000.00. We are specifically imputing to the defendant the fact that he received $15,000.00 contrary to the Taft-Hartley Act, and I don't

see how I can furnish any other particulars that wouldn't be evidence. The Criminal Rules do not provide for discovery, but I don't have any objection in saying that the $15,000.00 was received in two checks of $7,500.00 each. That's what I intend to prove.

The Court: Payable to whom?

Mr. Rodriguez Antongiorgi: They were issued, one by the Puerto Rican American Refinery, Inc., and the other by Central Mercedita, Inc., each in the sum of $7,500.00, and on February 21, 1953.

The Court: Payable to whom?

Mr. Rodriguez Antongiorgi: Payable to the Union de Trabajadores, etc., of which the defendant was the president, and we allege that in the indictment.

The Court: Is that satisfactory?

Mr. Romero: Yes, Your Honor, it is exactly what I needed.

MOTION TO DISMISS.

Comes, WADELMIRO ARROYO, the above named defendant, by his undersigned counsel, and unto this Honorable Court shows as follows:

That on December 21, 1956 a Motion For a Bill of Particulars, filed by defendant, was discussed before this court and the prosecuting attorney orally submitted the following facts which now are part of the indictment:

That the defendant, Wadelmiro Arroyo, received two checks, each for the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500) made payable to the order of "Union De Trabajadores de Factoria, Refineria y Ramas Anexas". One check was signed by the Puerto Rican American Sugar Refinery, Inc. and the other by Central Mercedita, Inc.

Therefore, the indictment, as it now stands, does not constitute an offense against the United States under 29 U.S.C.A. Section 186(b) and (d).

WHEREFORE: Defendant respectfully prays that the premises considered, this Honorable Court enter the proper order dismissing the charge against the defendant.

At San Juan, Puerto Rico, this 29th day of December, 1956.

PEDRO M. PORRATA
ROMERO BARCELO & HERRERO FRANK
By (s) CARLOS A. ROMERO BARCELO
Attorney for Defendant

HEARING ON MOTION TO DISMISS INDICTMENT.

The hearing on motion in the above entitled case was held before the HONORABLE CLEMENTE RUIZ NAZARIO, United States District Judge, sitting at San Juan, Puerto Rico, at 9:30 in the morning on January 11, 1957, the plaintiff being represented by Ruben Rodriguez Antongiorgi, Esquire, United States Attorney, and the defendant being represented by Carlos Romero Barcelo, Esquire.

Mr. Romero: We filed a motion for a bill of particulars and the following facts were given, that the defendant received two checks, each in the amount of $7,500.00 from Puerto Rican American Refinery, Inc., and Central Mercedita, Inc. The indictment in paragraph 3 says, "At all times hereinafter referred to, Wadelmiro Arroya was president of said Local 1781, the labor union referred to above, and as such was the representative of employees of the Puerto Rican American Refinery, Inc. and Central Mercedita, Inc., as hereinafter alleged, said employees being engaged in an industry affecting interstate commerce, within the meaning of the Act referred to above." Now, paragraph 4 of the indictment says, "On or about February 24, 1953, at Ponce, Puerto Rico, within the district of Puerto Rico and within the jurisdiction of this Court, the defendant Wadelmiro Arroyo, did wilfully and unlawfully receive

from the said Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., a sum of money in the amount of fifteen thousand dollars—". Now, the bill of particulars as submitted by my brother limits the prosecution to the proof that the defendant received two checks made payable to the Union, each one for the sum of $7,500.00. In the case of *United States* v. *Brennan*, 134 Fed. Supp. 42, it says "Bill of particulars should be recognized not only as instrument to produce additional information but also as one which has concurrent effect of limiting scope of government proof at trial."

The Court: I have no doubt about that. You don't need to cite it. The bill of particulars supplements the indictment.

Mr. Romero: As the indictment now stands, the charge against Wadelmiro Arroyo is that he received two checks payable to the Union, and is charged under Section 186(b) of Title 29 United States Code, which says, "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." In the case of *United States* v. *Ryan*, 100 L.Ed. 273, this statute was interpreted specifically as to the meaning of the word "representative". "A narrow reading of the term 'representative' would substantially defeat the Congressional purpose."

In this case, J. B. Ryan was given $1,000.00 every December of each year, and $500.00 in 1951. The Court in interpreting the word "representative" says that "The LMRA provides that the term 'representative' shall have 'the same meaning as when used in the National Labor Relations Act as amended by this Act.'" The pertinent definition, "The term 'representatives' includes any individual or labor organization.'"

In other words, this defendant Wadelmiro Arroyo as charged, is charged individually as being the representative. The union isn't charged. It is only Wadelmiro Arroyo as an individual representative charged with having received two checks made out to the order of the union. Well—

The Court: He is not charged with having received checks. He is charged with having received $15,000.00 not for the purposes provided in the section. But now when you ask for a bill of particulars, how did he receive the money, the particulars were that he received the $15,000.00 in two checks of $7,500.00 each, payable to the union. That's the charge. The medium was the checks, and the charge is that he personally received the $15,000.00.

Mr. Romero: That is our point. That's why we ask dismissal of the indictment. He did not receive anything as an individual representative. Whether or not as a union official he is guilty under this violation of the statute, that isn't what the indictment charges. The indictment charges him as personally and individually receiving $15,000.00, when the bill of particulars says he received two checks made out to the union. The union is a distinct person, a legal entity, different from Wadelmiro Arroyo. They are not the same person. Wadelmiro Arroyo is charged with, as an individual representative of the employees, having received $15,000.00. There can be two representatives, the individual representative or the collective bargaining representative of the employees. In the indictment, paragraph 3, it says, "... Wadelmiro Arroyo was president of said Local 1781, the labor union referred to above, and as such was the representative of the employees ..." In other words, he is accused as an individual representative. He can not receive money or another thing of value not given to him. The checks made out payable to the union were not given to him. They were given to the union.

The Court: They don't say that in the bill of particulars. You are assuming something that does not appear from the pleadings. They say that the payment of the $15,000.00 charged in the indictment was made by means of two checks.

Mr. Romero: That's right.

The Court: Issued by Puerto Rican American Sugar Refinery and Central Mercedita to the order of the union, of $7,500 each. But still it does not say that the checks were delivered to the union. They may have been delivered to Mr. Arroyo and the money never deliverd to the union.

Mr. Romero: Whether or not the money was never delivered to the union, or not, we feel that's a case of embezzlement. That isn't what the statute provides. The statute says clearly that "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept—". This is a statute which is *malum prohibitum*. It prohibits money or another thing of value. It does not go into the facts, whether Wadelmiro Arroyo was given a check for John White and he cashed the check in a bank. Wadelmiro isn't liable under this statute.

The Court: Don't you think the meaning of the term "receiving" would be worthless, then, if what you interpret to imply is that it is only the physical act of getting a paper or some money, that that's the nerve of the issue? Then nobody could be prosecuted.

Mr. Romero: Your Honor, Brennan and other labor leaders and the vice president of the employer in the case were accused and in that case there was actual money given, and on the facts there was a prosecution of the employer for the violation and this case says "In section of Labor Management Relations Act making it unlawful for employer to pay money to any 'representatives' of any of his employees, and for any 'representatives' of any em-

ployees to receive money from employer of such employees"—the Court held that the "term 'representatives' includes any individual or labor organization." In that case there were both the employer and the representatives of the employees indicted under the same charge because Section (a) also makes it punishable for the employer. In this case the employer hasn't been accused. And why not? Your Honor, I think it is clear that the employer, if he gave an amount of money, two checks, to Wadelmiro Arroyo made payable to the union, how could the employer be accused of giving money to Wadelmiro Arroyo individually?

The Court: But, still Wadelmiro Arroyo may have taken the money.

Mr. Romero: If he endorsed the checks and took the money, well, that's a matter of embezzlement, a matter of local law and Wadelmiro Arroyo has been indicted under the local law in Ponce.

The Court: That has nothing to do here.

Mr. Romero: No, but the fact is the statute of embezzlement is *malum en se*. This is *malum prohibitum*. In the case of *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, Justice Frankfurter says, "Very early Mr. Chief Justice Marshall told us, 'Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . .' *United States* v. *Fisher*, 2 Cranch 258. Particularly is this so when we construe statutes defining conduct which entail stigma and penalties and prison. Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning, but when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should

have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

We feel there is no ambiguous implication. The term representative of the employees is the one that commits the offense either as an indivdual or as the collective bargaining union. In the case of *Ryan* that was decided. I think the prosecuting attorney said Wadelmiro Arroyo received two checks. He is held responsible although he didn't receive any money or other thing of value to Wadelmiro Arroyo under this Act, because they were made out to the order of a third person. Your Honor, we definitely feel that Wadelmiro Arroyo as an individual, if the facts of the bill of particulars are proven, there is no offense against the Act and the Act in itself is clear. Sections 302(a) and (b) of the Act are identical except one makes the employer liable, and the other the representative of the employees. Where the representative of the employees can be accused of having committed an offense, so can the employer, Your Honor, and in this case it is clear that the employer has not been indicted, and the reason is clear. How could the employer be said to have given money or other thing of value to Wadelmiro Arroyo when what he gave was two checks made payable to the union? Wadelmiro Arroyo, in this indictment, is not the union. He is the representative of the employees as an individual. Two constructions were given by the Labor Management Relations Act for the interpretation of the term representative in the case of *United States* v. *Ryan*. We rest our case.

Mr. Rodriguez Antongiorgi: I agree with my brother attorney that this statute does not require a criminal intent. That much I agree. Now this indictment was drafted before the *Ryan* decision of the Supreme Court that my brother attorney cited. He would be right if Judge Frank's opinion in the Second Circuit would have been upheld, but

now under the decision of the Supreme Court I think that the Government's contention is fully supported.

We allege here, this is a charge that Wadelmiro Arroyo as president of this union and as a representative of the employees received from this employer, Central Mercedita and Puerto Rican American Refining Company, $15,000.00. When they requested a bill of particulars I just supplied the mechanism. They presented two checks in the name of the union one issued by the Puerto Rican American Sugar Refinery, and the other by Central Mercedita. Whether Wadelmiro Arroyo received the money or not, or whether he had the authority of the union to cash those checks is a matter of proof, or if he had authority from the union. When the Government produces proof we will determine whether he received a thing of value under the statute. The Supreme Court has held that he is a representative of the employees and chargeable as the representative of the employees. I don't have to charge the union, I could charge both. In the *Mejias* case we charged both the union and the president, but here we have just charged the president of the union, and we allege it is an industry in interstate commerce, and he received that money and I supplied the particulars by saying he received those checks. I don't have to say what use he made of them, how he cashed them, what happened, because that's a matter of evidence, it is a matter of proof.

If it turns out from the evidence that he did not receive anything of value, that those checks were void, or he had no authority to cash those checks, if that happens after the evidence is in, then my brother attorney can move for judgment of acquittal and for dismissal of the case after the Government's evidence is in, but at this stage the motion to dismiss, I believe, must be denied because there are allegations here that fully come within the coverage of the Act, especially after the decision in the *Ryan* case.

The Court: Yes. What I see, Mr. Romero, is that all that the bill of particulars supplies is the physical act of how the money was delivered. What was delivered. Suppose that the United States Attorney would have said that the employer delivered to X an envelope containing $15,000.00 in bills, that is, the delivery was not made directly to Arroyo, but nevertheless it may appear at the trial that X delivered that money to Arroyo.

Mr. Romero: That's right. If you give it to a person to give to somebody else, you are actually giving it to another person. Here, Wadelmiro Arroyo was to give it to the union.

The Court: Well, we don't know. I believe that's a question for the trial. I believe, of course, you are raising a question that would be properly raised at the end of the evidence of the Government at the trial. If it appears that the employer issued these two checks to the union for a lawful purpose under the Act, that the union actually received the proceeds of that money and made a bona fide compliance with the terms of the Act, about a trust, etc., for this and that purpose, then if, after that, Wadelmiro Arroyo as one of the officers of the union embezzled this money, then the question would be different. Because then that would be a question between the Union and Arroyo, and it would be a crime against the laws of the Commonwealth of Puerto Rico and would be a violation. But suppose that simply the issuing of these checks to the order of the Union was a mere sham, simply had no purpose whatsoever because he received the money, endorsed them, pocketed the money and did not use the funds at any time for the purposes contemplated by the law. Then I believe it would be a question for the jury to determine whether he received the money personally for purposes not authorized by the law.

Mr. Romero: That's why we have raised this motion now, because we don't feel this is a question for the jury. Defendant Wadelmiro Arroyo is given two checks. Supposing for the fact of the argument, that we admit that Wadelmiro took those checks, went and endorsed and cashed them and took the money. Is that a violation of the strict words of this statute? Doesn't the statute say that Wadelmiro Arroyo must be given the money or another thing of value? The authority that he has as president of the union is not looked upon by the statute. The statute merely says—

The Court: I disagree with you. It is looked upon by the statute. The statute contemplates that when the officer of a labor union does an act he does it in his bona fide capacity of officer of that union, and for the purposes provided by the Law.

Mr. Romero: Exactly, Your Honor.

The Court: But if he does not do it, then it would be different. The situation would be different.

Mr. Romero: That is why I say two persons are responsible under this Act, the representative and the individual. Or the representation of the union as representative of the employees and Wadelmiro Arroyo could have been indicted as a president of the union. In other words, that the union committed the offense and Wadelmiro Arroyo too, because he participated in it, but this does not charge Wadelmiro Arroyo with having done that, but as an individual, a representative of the employees. According to the *J. B. Ryan* decision, he accepts money or another thing of value—and two checks made payable to a third person are not receiving anything of value. If a president of a corporation receives a check made out to the corporation he isn't receiving that for himself. If he has authority to cash those checks, he is responsible through an embezzlement to the corporation, if he takes it himself, but not re-

sponsible for having taken money if the checks were made out to the corporation.

The Court: I am sorry, but I can not agree with you. You may renew the question at the trial, and it is a very important question to be raised at the trial. It may be, if the evidence does not support the indictment, in that respect, but this is a very important case on that question. I believe this is the only case.

Mr. Rodriguez Antongiorgi: The first case that has been brought nationally from the point of view of this phase.

The Court: You may get an acquittal. But I can not, on the basis of the pleadings, grant the motion. The motion to dismiss is denied.

EXHIBIT "A"

SUMMONS TO DEFENDANT TO APPEAR AT TRIAL.

THE PEOPLE OF PUERTO RICO, to Wadelmiro Arroyo, Castillo Street, Ponce.

You are hereby summoned to appear before this Honorable Superior Court of Puerto Rico, Ponce Division, at the Court building in this city, on the 29th day of January, 1957 at 8:00 A.M. for trial in the criminal proceeding instituted by "The People of Puerto Rico" against you for the crime of embezzlement and you are hereby warned that if you do not appear your bail bond shall be confiscated and a warrant for your arrest shall be issued.

Notify the bailors Mr. ——— and Mr. ——— so that they may be advised.

ISSUED under my signature and the official seal of the Court of Ponce, Puerto Rico, this 13th day of December, 1956.

JOSE ALONSO ALBITE
Clerk

by: (s) RIVERA
Assistant Clerk

MOTION TO CHALLENGE THE ARRAY
(Impugning the Petit Jury).

To the Honorable Clemente Ruiz Nazario

U. S. District Judge

Comes, the defendant in the present case, and by his undersigned counsel respectfully challenges the array of the petit jury herein drawn for his trial, for the following reasons, to wit:

C) Because from the face of the list of fifty-six prospective petit jurors called upon to serve as qualified jurors in the present case, and in the light of the answered questionnaires in the court's files it appears that, in contrast with the listed bankers, merchants, jewelers, government employees, housewives, and members of the middle and upper classes of the community; daily wage earners, laborers and members of the working class of Puerto Rico as a whole have been excluded from the array, and their exclusion therefrom not only operates as a restriction upon the rights of the defendant to be judged by a cross-section of the community representative of his peers, but is in itself a denial of the equal protection of the laws, contrary to, and in violation of the fifth and sixth Amendments of the Constitution of the United States.

Such limitation of procedural guarantees, not only affects the defendant in his fundamental rights, but "also injures the jury system, the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts" *Ballard et al v. U. S.*, 329 U.S. 187 at 195.

Wherefore, defendant submits that his challenge to the array is not intended to delay or prostrate the proceedings and that the premises considered, his trial be continued

until this challenge is properly heard and decided as in law and justice this Honorable Court may see fit to decide.

At San Juan, Puerto Rico this 12th day of February, 1957.

RAFAEL V. PEREZ-MARCHAND
Counsel for Defendant
ROMERO BARCELO & HERRERO FRANK
by: (s) CARLOS A. ROMERO BARCELO
One of the attorneys.

LIST OF PETIT JURORS TO APPEAR ON FEBRUARY 12, 1957.

Name	*Occupation*	*Office*	*Address*	*Age*
1. Corinna Anselmi Blanco				
2. Ramon T. Aponte	Adm. Officer	Dept. of Health	Santurce	40
3. Humberto Bas	Trav. Agent (Supv.)	Pamcor Inc.	Santurce	29
4. Simon Benus	Merchant		Santurce	41
5. Alberto Calderon Aldea	Insurance	Anglo P. R.	San Juan	30
6. Jose A. Camacho	Merchant Manager	P. R. Express	Santurce	46
7. Robert C. Ellis	Banker		Ashford Ave.	
8. Francisco Fantauzzi	Banker		Taft St.	50
9. George B. Fisher	Accountant		Ext.Roosevelt	49
10. Carmen Garcia				
11. Juan Angel Giusti	Merchant	Giusti Bazar	Condado	49
12. Miguel Angel Gutierrez	Acct. Controller	Fullana Ent.	El Vedado	
13. Nicolas Gusman Belaval				
14. Bill Harris	Sports Director	Caribe Hilton	Condado	
15. Manuel Hernandez	Ins. Dirct. Vocational Rehabilitation		Perez Morris	45
16. Rafael C. Irizarry	Accountant	Auditor	San Juan	55
17. Andrew Koski				
18. Adelina Laugier	Housewife		Condado	
19. Ernesto Lopez	Officer N.	Nat. City Bank	Santurce	37

	Name	*Occupation*	*Office*	*Address*	*Age*
20.	Frank Lopez	Inspector	Dept. of Agriculture	Bayamon	43
21.	Juan Marr Ramos	Farmer-Merchant		Mayaguez	58
22.	Oscar Martines Mercado	Merchant	Urb. Santa Maria		55
23.	Manuel Martorell	Chief Ing.	Div. Post Bldgs.	Ext.Roosevelt	42
24.	Dorothy E. Miller	Housewife		San Juan	
25.	Gertrude Morhmann	Secretary		Taft St.	
26.	Honorio Moreno	Vice-President	Banco Popular	Hato Rey	60
27.	Franklin R. Otto	Banking	Chase Manhattan	Condado Apts.	39
28.	J. F. Pascual	Merchant		Santurce	40
29.	Alfonso E. Pena	Traffic Mgr.	Steamship	Santurce	40
30.	Bernard Rashkin	Management Eng.		Condado	
31.	Carmen Bustelo Racafort	Housewife		Humacao	
32.	Jose Carmelo Rodriguez	Plant Mgr.		Bay View-Catano	40
33.	Jose I. Sotomayor				
34.	Rafael G. Vidal Gonzalez	Bank Employee		Santurce	46
35.	Joe Watson	Civil Engineer	Antilles Eng. Office	Ft. Brooke	49
36.	Kay Zegri	Representative	Helena Rubinstein	Guaynabo	
37.	Alfonso Martines	Sub. Acctant	Credito & Ahorro Bank	Santurce	28
38.	Rafael Ambrosiani	Mgr.	P. R. Nu-Treads	Santurce	36

	Name	*Occupation*	*Office*	*Address*	*Age*
39.	Angel Arce	Asst. Chief	Bu. of Prop. Taxes	Santurce	43
40.	Adrian Arenas Nazario	Off. Clerk	South P. R. Sugar Co.	Ensenada	31
41.	Cesar Arroyo Dechoudens	Accountant		Mayaguez	53
42.	Ermelindo Auffant	Adm. Asst.	Warehouse Section P. R. Water Res.	Santurce	46
43.	Manuel E. Balzac	Civil Engineer		Ocean Park	34
44.	Raul Barnes	O.P.A. Inspector		San Juan	45
45.	Herminio Barreto	Traveling Salesman	Ponce de Leon	Santurce	40
46.	Jose Basera Defillo	Office Clerk		Mayaguez	46
47.	Juan Bayron	Postal Employee		Mayaguez	60
48.	Alicia Benet Ramirez	Housewife	50 Sagrado Corazon	Santurce	
49.	Carlos Bird Lopez	Employee	Farm Security Adm.	Hato Rey	38
50.	Fernando Bononis	Banking		Humacao	39
51.	John P. Bouret	Jeweler		Miramar	31
52.	Herbert Breslow	Merchant		Villa Caparra	31
53.	Hobart E. Brown	Vice Pres. & Treas.	H. E. Curry Inc.	Las Lomas	52
54.	Frank Buso	Bankers Employee	Credito & Ahorro	Santurce	34
55.	Warwick W. Butler	Businessman		Condado	
56.	J. M. Buzby	Manufacturing Representative		King's Court	46

GOVERNMENT'S EXHIBIT NO. 3.

1953-1955

COLLECTIVE BARGAINING AGREEMENT

Between

The Union of Factory Workers, Refinery and Related Branches to the Sugar Industry Affiliated to the I.L.A., A.F.L. Local #1781

and

Central Mercedita, Inc., and P. R. American Sugar Refinery, Inc.

* * *

ARTICLE (6)

A. *Welfare Fund*

The employer shall establish a fund which shall be known as the *Welfare Fund* in the amount of $15,000. This fund shall be used to furnish and provide the workers of the Employer covered by this Agreement and the members of their direct family such as minor children, parents, spouses, and other direct relatives of the workers who live under his roof and who depend on him, with means of hospitalization, medical assistance, and other medical aid in case of non-occupational illnesses or accidents.

This welfare fund shall be administered by a committee that will be appointed by mutual agreement between the Union and the Employer. The committee thus appointed shall furnish the Employer monthly with a written statement of the disbursements made from said fund.

* * *

GOVERNMENT EXHIBIT NO. 4.

PORTO RICAN AMERICAN SUGAR REFINERY, INC.
Mercedita, P. R.

Check No. 35
Voucher No. 88
February 21, 1953

Pay to the Order of: Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la Industria Azucarera Afiliada a la I.L.A., Af/L. Local #1781 $7,500.00

Snow White $7,500 & 00 cts.

Porto Rican American Sugar Refinery, Inc.

(s) (Illegible Initials) Serralles Perez
Authorized Signature

(s) (Illegible Initials) Serralles
Authorized Signature

In Charge of
Banco de Ponce
Ponce, P. R.

(S.W. & Co.)
(Examined)

Endorsement on Reverse:

Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la Industria Azucarera Afiliada a la I.L.A., Afl. Local #1781.

(s) Wadel A.
Pres.

(s) Luis (Illegible)
Sec.

(Bank rubber stamps—illegible)

GOVERNMENT EXHIBIT NO. 4-A.

PORTO RICAN AMERICAN SUGAR REFINERY, INC.
Mercedita, P. R.

Check No. 35
Voucher No. 88
February 21, 1953.

Pay to the Order of: Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la Industria Azucarera Afiliada a la I.L.A.; Af/L Local #1781 $7,500.00

Snow White $7,500 & 00 cts.

In Charge of:
Banco de Ponce
Ponce, P. R.

To cover bill as follows:

Paid by Porto Rican American Sugar Refinery, Inc.
Amount $7,500.00
In favor of U.T. de F.R. y R.A. I.A.

Fecha 2/21/53
Check No. 35
Banco de Ponce

Covering:

Welfare Fund for the year 1953, in accordance with contract signed on Feb. 21, 1953 $7,500.00

(S.W. & Co. Examined)

Distribution	Prepared by	Entered by	Checked by
Account	Amount		
G.G. & Administrative			
Exp. Advanced			
Welfare	$7,500.00		(Illegible Initials)
		Audited	Approved
	(Illegible Initials)	Auditor	
			(Illegible Initials)

If payment is made in cash, this voucher must be signed by the person in whose favor it has been drawn.

Signature

GOVERNMENT EXHIBIT NO. 5.

Central Mercedita, Inc.
Mercedita, P. R.

Check No. 2-303
Voucher No. 885
February 21, 1953

Pay to the Order of: Union de Trabajadores de Factoria, Refinera y Ramas Anexas de la Industria Azucarera Afiliada a la ILA, $7,500.00.

Exactly $7,500 & 00 cts.

(Rubber stamp:)
(Banco Credito y Ahorro Ponceno)
(Paid)
(Feb. 25, 1953)
(Ponce, P. R.)

Central Mercedita, Inc.
(s) (Illegible Initials) Serralles Perez
Authorized Signature
(s) (Illegible Initials) Serralles
Authorized Signature

In Charge of
Banco de Ponce
Ponce, P. R.

Stamped
(S.W. & Co.)
(Examined)

Endorsement on Reverse:

Union de Trabajadores de Factoria, Refineria & Ramas Anexas de la Industria Azucarera Afiliada a la I.L.A.

(s) Wadel A.
Pres.
(s) Luis (Illegible)
Sec.

(Bank rubber stamps illegible)

GOVERNMENT EXHIBIT NO. 5-A.

CENTRAL MERCEDITA, INC.
Mercedita, P. R.

Check No. 2-303
Voucher No. 885
February 21, 1953

Pay to the Order of: Union de Trabajadores de Factoria, Refineria, y Ramas Anexas de la Industria Azucarera Afiliada a la H.A. $7,500.00

Exactly $7,500 and 00 cts.

In Charge of
Banco Credito & Ahorro Ponceno
Ponce, P. R. To Cover Bill as Follows:

Paid by Central Mercedita, Inc.	Date: 2-21-53
Amount $7,500.00	Check No. 2-303
In favor of: Union de Trab. de Factoria, Ref. etc.	Banco Credito & Ahorro Ponceno

Covering: 1953 Welfare Fund, according to contract signed February 21, 1953.

Distribution Account	Amount	Prepared by	Entered by	Checked by
Advance Welfare Exps.	$7,500.00			(Illegible Initials)

Audited
Auditor

Approved
(Illegible Initials)

GOVERNMENT EXHIBIT NO. 5-B.

Central Mercedita, Inc.

Date: February 21, 1953

Please make out check as follows:

Amount $7,500.00

In favor of: La Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la Industria Azucarera Afiliada a la I.L.A., A.F.L., Local 1781

Bank: _____

Purpose: Welfare Fund for the year 1953, according to contract signed February 21, 1953.

(Rubber-stamped: PAID Feb. 21, 1953)
Central Mercedita, Inc.

Account to be charged: Advanced Welfare Fund Expenses

(Illegible Initials)
Authorized Signature

[13] The Court: The first thing I must say is I believe this motion has come too late. If you intended to challenge the array you should have done it not on the very morning of the trial, but before.

Mr. Perez Marchand: Regarding the apparent belated motion, I wish to state for the record that the facts upon which this motion has been written came to the knowledge of this attorney on Friday, that is, three or four days ago. The reason, therefore, is that until then this attorney had not been asked or requested to join counsel for the defense. And junior counsel, upon consulting this old warhorse, were informed that if there were cause to challenge the array they should go ahead and formulate their objections because on the strength of the jurisprudence in the Taft-Hartley Act cases, wh her civil or criminal, a challange to the array based upon

The Court: Please talk a little louder. I can not hear.

Mr. Perez Marchand: I was saying that upon being consulted by junior counsel for the defense I informed them that since this case arose out of an alleged violation of the Taft-Hartley law, whether the case be civil or criminal, a fundamental objection to the array based upon failure to have a cross section of the community in the petit jury must be filed [14] before and after trial. The cases have gone so far as to sustain the objection for fundamental reasons even after trial, but in the case at bar the question uppermost in the mind of this attorney was that upon looking at the list of prospective jurors it was apparent that a whole class, a whole group of members of the community have been excluded from jury service in this case. I would like to say now, before I go into the merits

The Court: Did you look at the whole list of 1800

jurors, the list in the Clerk's office? That's the array. It isn't the 54 selected here. Did you look at that?

Mr. Perez Marchand: I think that my young colleagues did, but I did not. I have just worked on the papers that have been brought to me, and I would like to say before going into the merits of the motion that we need not discuss, we shall not discuss, paragraphs A and B.

The Court: You withdraw paragraphs A and B?

Mr. Perez Marchand: They are withdrawn.

The Court: Let the record show that.

Mr. Perez Marchand: And we shall lay our emphasis on paragraph C, because from the face of the list of 56 prospective petit jurors called upon to serve as qualified jurors in the present case, and in the light of the answered questionnaires in the court's files, it appears that in contrast with the list of bankers, merchants, jewelers, Government [15] employees, housewives, and members of the middle and upper class of the community, daily wage earners, laborers, and members of the working class in Puerto Rico as a whole have been excluded from the array, "and their exclusion therefrom not only operates as a restriction upon the rights of the defendant to be judged by a cross-section of the community representative of his peers, but is in itself a denial of the equal protection of the laws, contrary to, and in violation of the fifth and sixth Amendments of the Constitution of the United States."

We submit that such limitation of the precedural guarantees not only affects the defendant personally in his fundamental rights, but it works an injury—

The Court: Mr. Perez Marchand, I will not let you go further with the discussion of this question, because I believe that the challenge has no legal basis, because in order to challenge the array you must look to the list. If there are 1800 members in the array, you have to challenge the whole

array, alleging what you allege here now. But you are only referring to 56 prospective jurors which were drawn from the list of 1800. And of course if that is the motion it is defective in that particular, and the Court cannot [16] grant it because even if these 56 were all of them millionaires, as they have been selected from a list of 1800 it does not mean there are no wage earners on the list.

Mr. Perez Marchand: I will say with reference to the Judge's reproach that the information I received from my junior colleagues is that they went through the whole array and they do not remember having seen workers or members of the laboring class.

The Court: But this is not at issue here. You know, you were an attorney in the case of *United States* v. *Santos*, I believe it was—

Mr. Rodriguez Antongiorgi: Mirabal Carrion.

The Court: And it was thoroughly covered in that case. The Court stated specifically in that case what the procedure was and you should, plenty in advance, file a motion challenging the whole array, the whole list, and pointing out from the list what the situation is that appears and whether there has been a systematic exclusion of a class. Then you have to bring a showing of that before the Court enters to consider the matter. In that case you may remember I took about six months and gave all the opportunities necessary to the defendants to show that. And that they brought a list, the whole list, and that they classified by occupation. And it appeared from the list proper, prepared by one of the defendants who is himself an attorney, that there had been no [17] systematic exclusion of any respective class or any cohesive group, as they are called, in that list. Then Mr. Garcia who prepared the list came to the stand and from his testimony there it further appeared that even the classifications he made were wrong, and that there were more wage earners in that list than the ones he had origin-

ally classified. Now, that was the procedure followed there, and that's the procedure provided by law. That list in that case, which was used in that case, challenged in that case, is the same list from which these jurors, prospective jurors impanelled for serving in this case were drawn. So that I don't believe I can entertain your motion. Because, first, it is—

Mr. Perez Marchand: I shall not detain the Court with a long argument, but on the strength of the information given this attorney I submit the case on the jurisprudence of *Thiel* v. *Southern Pacific*—

The Court: I considered that case precisely in the *Mirabal* case.

Mr. Perez Marchand: —at 328 U. S. 327, where specifically the Supreme Court of the United States, referring to a petit jury and not to the broader and encompassing list of the array for the term of the Court, sustained the objection that there had been an exclusion and therefore that the defendant should not have gone to trial at the risk of not having an impartial trial according to constitutional principles. [18] We submit the case.

The Court: Well, the motion is denied. First, because it has not been filed in the proper form, there is no legal basis for considering the motion. Second, because even if it was sufficient, that it is not because the whole array is not challenged. It is untimely also. Third, because it should have been filed following the procedure already established for this type of motion as stated by the Court, by this same Court, in *United States* v. *Mirabal Carrion*. And fourth, because it is without merit for the same reasons stated in the case of *Mirabal Carrion*, which apply to this case as well. The same jurisdiction which was challenged in the *Mirabal* case is the jurisdiction upon which the jurors in this case were drawn, that is, the 56 jurors. And the same reasons that the Court had for denying the

motion in the *Mirabal Carrion* case are sufficient to deny the defective motion filed in this case.

* * *

[21] Mr. Rodriguez Antongiorgi: May it please the Court, Mr. Foreman, ladies and gentlemen of the jury. You have been selected to try this case which, as I will point out later in my summation when we finish, to my mind is a very important case as far as principles are concerned. It is a rather novel case. The Judge of course will advise you on the law, and it is a new law. It is what they call the Labor-Management Relations Act of 1947, commonly known as the Taft-Hartley Act, the law approved by Congress to regulate in the interests of the public the relations between employers and employees.

As the Judge read the indictment to you, in substance that indictment is that this defendant as a representative of the union, a union which I will always refer to as just the "Union" because it has a very long name. Its name is "Union de Trabajadores de Factoria, Refineria y Ramas Anexas de Ponce", so I will refer at all times to it as the "Union"; and this defendant was the president of that union, and as such he was the representative of that union before [22] the National Labor Relations Board for all purposes and for all transactions and dealings with employers who used the services of the employees, members of that union. The employers are two corporations in this case, the Central Marcedita, Inc., a corporation, and the Puerto Rican American Sugar Refinery, Inc., commonly known as Industries Serralles, well known in Puerto Rico.

Now, we charge the defendant with the following: We charge him with having received the sum of money in the amount of $15,000 from these two corporations, the Serralles Industries, and that sum of money was in fact received by him pursuant to a collective bargaining agreement entered into between the Serralles Industries and the

Union for the exclusive purpose, as provided by the collective bargaining agreement which I will introduce in evidence here, of using it as a benefit, a welfare fund for the members of the union for the treatment of their medical needs. That collective bargaining agreement, and those $15,000 were handed over in two checks, one from each corporation in the amount of $7,500 to the defendant for that purpose, and we will show to you how that fund, that benefit fund or welfare fund, was to be administered. It was to be administered in the following way: by having a committee in which a representative of the Serralles Industries would be placed. A member of that committee is a witness that you will hear, Mr. Pedro Goyco, one of the labor relations experts from the Serralles Industries. [23] The other was the defendant himself, as president of the union and there was a third member of the committee also, as we will prove. The requirements of that collective bargaining agreement—

Mr. Pérez Marchand: May it please the Court, my brother attorney will excuse me from interrupting but I think he is going out of the bounds of the case. The case, so far as it relates to the Taft-Hartley Law, deals only and exclusively with, as charged, having illegally received moneys not dedicated to the exceptional provisions contained in Paragraph (c) of section 186, Title 29, United States Code. My distinguished brother attorney Mr. Rodriguez Antongiorgi is now dealing with the local aspect of the law.

The Court: Well, he has to tell the jury what he intends to prove, and how he intends to prove it, and he has the right to do that. Whether, if he brings that evidence before the Court, it is admissible or not, is a question for you to raise then, but it is a proper presentation of the case to the jury. If a fund was created, he has to lay the basis for that, say how the fund was created, who the trustees are,

what should be done, and then what happened and what he intends to prove. What he states to the jury is not evidence in the case. You realize that, of course, and I will charge the jury about that, the same as what you state before the jury isn't evidence. It is a mere statement of the attorney [24] and he has the right to present his case that way.

Mr. Perez Marchand: With all due respect to the Court, I think that for psychological reasons, as well as legal reasons, none of the attorneys, whether for the defense or for the Government should state what is not in the law to submit to the jury.

The Court: He does not have to argue to the jury on the law, but on the facts, and the law. That's his argument. Now whether those are the facts, and whether that is the law, that's something to be determined from the evidence offered and admitted and from the charges of the Court to the jury. But counsel has the right to inform the jury what he intends to prove, what it is all about. Of course, if the United States Attorney would be telling or explaining something to the jury, something which is outside the bounds of the crime itself, something that has nothing to do with the case — then it would be different. But as far as the Court has heard the United States Attorney, he is within the bounds of permissible presentation to the jury.

Mr. Perez Marchand: I respectfully take an exception.

The Court: You may proceed.

Mr. Rodriguez Antongiorgi: Now, ladies and gentlemen, the collective bargaining agreement was set up, and the $15,000 was delivered in two checks, and there was a committee to administer those funds. Under the provisions of the [25] regulations which had prevailed in the prior year, and under the provisions of the agreement made between the Serralles Industries and the union, through this defendant, that money was to be withdrawn from the bank,

to be deposited in the bank in Ponce, ear-marked as a benefit fund, the union welfare benefit fund. And each check for each benefit was to be signed, or as bankers say, countersigned, by both the representative of the employer and the representative of the union, Mr. Wadelmiro Arroyo, or whoever the union designated. We will prove to you beyond any reasonable doubt that the defendant took those checks, went over to the National City Bank in Ponce, opened an account in the sum of $15,000, disregarded completely the terms of the collective bargaining agreement, refused to cooperate with the representative of the Serralles Industries, to comply with the provisions of the agreement to withdraw the funds, and after opening that account with his own signature and with his own authority, started withdrawing from those funds, from the account in the National City Bank.

When those funds were depleted to an amount of about $9,000, at the request of the Bank because of the difficulties that they were having with this account, the money was transferred to another bank in Ponce, the Banco de Ponce, and the National City Bank delivered to him a manager's check for $9,812, and he went over to the Banco de Ponce and [26] deposited that manager's check in an account, opened an account in the name of the union, but under circumstances in which he had complete control for all withdrawals, because he was the only person authorized and the only person to make withdrawals from that fund. Then, he mingled that check with other funds from the union, in violation of the collective bargaining agreement, and of course started withdrawing from that fund and in a very few weeks the $15,000 were gone.

Now, where did those $15,000 go is a point which under the theory of the Government in this case is material but not essential, because the theory that we will present in this case, and of course the law will be given to you by the

Court, and whether the Court accepts or not the theory of the Government in this case is a question for the Court. But the theory of the Government in this case is that when this defendant as a representative of the union received the $15,000 and disregarded the collective bargaining agreement and used it for other purposes, or even if he used it for some purposes that might have been contemplated by the agreement and refused to comply with the provisions of that agreement, he violated the provisions of the Taft-Hartley Act.

But we will prove more to you. We will prove that a substantial part of those funds were used by this defendant for his own personal benefit. Not only in violation of the terms of the collective bargaining agreement which provided [27] that the funds to be used exclusively for medical expenses, etc., but not even for the other benefits of the members of the union, but for his own personal benefit, such as this, which I make a commitment with you I will prove: making a payment for buying an automobile for himself; buying office equipment for an office for himself; buying furniture for his home; buying a refrigerator; making a number of checks to cash, and spending the money for purposes that we don't know, but that he must know.

Mr. Perez Marchand: If I may please the Court, again I beg to be forgiven for interrupting my distinguished colleague but under the terms of the indictment in the present case we earnestly urge that he be not allowed to expand on an alleged or supposed embezzlement case. We are not dealing with an embezzlement of funds or misuse of funds under the Taft-Hartley law. We are exclusively concerned with a violation of Section 186, Title 29, of the United States Code.

The Court: But the fact that some facts constitute a violation of the Taft-Hartley Act, and at the same time may be a violation of the penal code of Puerto Rico, that is,

may be an embezzlement, does not prevent the United States Attorney from arguing that.

Mr. Perez Marchand: The point we make, Your Honor, is that under the terms of the statute the crime, if any is committed according to Section (a) between the employer who [28] delivers the money and the employee who receives the money, contrary to the terms of the exceptions contained in paragraph (c). That's the crime. The charge follows that language and it limits the Government to the statement that "On or about February 24, 1953, the defendant Wadelmiro Arroyo wilfully and unlawfully received from"; There is absolutely no allegation nor is there even an implication that the use or misuse of the money is to be a part or the main contention of the Government. As a matter of fact the line that my distinguished friend has taken has placed him flatly on a fatal variance to the charge. If he intends to prove that, and he moves away from the charge, that would be a variance so fatal to the case that it would not require long argument to show that the Government has failed in its case from the very preliminary statement.

Mr. Rodriguez Antongiorgi: Your Honor, may I answer this?

The Court: You are arguing the case before the jury.

Mr. Rodriguez Antongiorgi: It should be very clear, Your Honor, that when we charge that there is an illegal receipt of money, then we negative the exception. If there had been a lawful use there would have been no violation, but we negative the exception. We have to prove that there was an illegal use of the welfare fund, in order that we can negative the exception.

The Court: Yes. You may go ahead.

[29] Mr. Rodriguez Antongiorgi: As I was telling you, ladies and gentlemen of the jury, that would be the Government's case. We will then prove that there was this violation of the Taft-Hartley Act, because through this evidence

this defendant received this sum of money in violation of the Act, in that he did not use the money for the purpose created by the collective bargaining agreement.

I trust that we will prove the case beyond any reasonable doubt, and of course complying with the oath you have taken of hearing all the evidence and being fair to the Government and the defendant, after the Judge gives you the instructions, I will ask that you bring a verdict of guilty. Thank you.

* * *

[32] PEDRO G. GOYCO

a witness called by and on behalf of the plaintiff, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name for the record. A. Pedro G. Goyco.

Q. You may testify either in Spanish or English, as you wish. Where are you from, Mr. Goyco? A. I am from Central Mercedita.

Q. What position do you hold? A. Labor relations officer.

Q. Does that also cover refining, the other corporation Puerto Rican American Refinery, Inc.? A. Yes, sir.

Q. In other words, you are an officer of both corporations? A. Yes, sir.

Q. And what's the nature of your position as labor relations officer, in a few words? Please explain the nature of your duties? A. To deal with the labor organizations and the labor relations officers, Federal and insular, in regard to labor problems.

[33] Q. Will you please tell us in very few words also what is the business of Central Mercedita, Inc., and Puerto Rican American Sugar Refinery, Inc.? What is their business? A. The sugar business.

Q. You mean the processing? A. The sugar industries. Mercedita grinds sugar.

The Court: Wouldn't the defense stipulate that both Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., are engaged in interstate commerce?

Mr. Perez Marchand: Yes, we stipulate it.

The Court: It is so stipulated and approved.

Q. As such labor relations officer for Serralles Industries, I mean both corporations, do you negotiate and deal with collective bargaining agreements? A. Yes, sir.

Q. Do you know the defendant in this case, Wadelmiro Arroyo? A. I know him personally.

Q. How long have you known him? A. Since 1949.

Q. Do you see him in this room? Will you please point him out? A. Yes, he is sitting there.

The Court: Let the record show that the witness points to the defendant.

[34] Q. As labor representative of the Serralles Industries have you had dealings and transactions with him in your official capacity? A. Yes, sir, since 1947, up to date.

Q. In what capacity has he made those dealings with you? A. As president of the labor organization he presides, and as principal negotiator of that labor organization.

Q. Please tell, me, are the members of this union Local 1781, "Union de Trabajadores de Factoria, Refineria y Ramas Anexas"? Are those members of the union workers of the Serralles Industries? A. The members of his union?

Q. I mean, the individual members of the union, are they employees of those companies? A. Yes, they are.

Mr. Rodriguez Antongiorgi: May I have this marked as Identification 3 for the Government?

[A copy of the collective bargaining agreement was marked Identification 3 for the Government.]

The Court: Why don't you show it to the defense? They may stipulate.

Mr. Rodriguez Antongiorgi: Yes, this is a signed copy of the collective bargaining agreement signed by both parties. You may stipulate as to that and we may introduce it in evidence. It is a copy, but duly signed by all parties. I also [35] have a translation of this signed by Mr. Ramirez. Here is the translation.

Mr. Perez Marchand: Both documents are accepted as true.

The Court: So you stipulate that this Identification 3 and the translation—

Mr. Perez Marchand: Is it 3 and 4, or just 3?

The Court: No, just 3, because the translation is a requirement of the rules. Constitute a true copy of the collective bargaining agreement entered into between the union, through the defendant, and—

Mr. Perez Marchand: Containing the welfare fund agreement.

The Court: —and the two corporations.

Mr. Rodriguez Antongiorgi: It covers the two corporations.

The Court: That's the Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., and that the welfare fund is created—

Mr. Rodriguez Antongiorgi: Article VI.

The Court: —under said document.

Mr. Rodriguez Antongiorgi: That's right.

The Court: The stipulation is approved and the document is admitted and ordered marked Exhibit 3 for the Government.

[The collective bargaining agreement was thereupon admitted in evidence and marked Exhibit 3 for the Government.]

[36] Mr. Rodriguez Antongiorgi: May I have these two documents marked as one identification, which will be num-

ber 4, and this one as Identification 5 composed of three parts?

The Court: That will be 5 and 5-A and 5-B, and that one will be 4 and 4-A.

[The documents in question were marked Identification 4 and 4-A, and Identification 5, 5-A, and 5-B for the Government.]

Mr. Rodriguez Antongiorgi: Showing counsel the two cancelled checks with vouchers, each in the amount of $7,500, issued by each one of the corporations in the name of the union and endorsed by the president of the union. On one check the president and secretary of the union, and the other one likewise.

The Court: No objection?

Mr. Perez Marchand: No objection.

The Court: Are you offering them in evidence?

Mr. Rodriguez Antongiorgi: I am offering them in evidence, the two checks issued pursuant to the collective bargaining agreement in the amount of $7,500 each, as stipulated, in the checks for the welfare fund.

The Court: They are admitted as Exhibits 4 and 4-A, and Exhibit 5, 5-A and 5-B.

[The checks and vouchers were admitted in evidence and marked Exhibit 4 and 4-A, and Exhibit 5, 5-A, and 5-B for the Government.]

[37] Mr. Rodriguez Antongiorgi: Showing the witness—

Mr. Perez Marchand: Pardon me, I understand this to be Exhibit 4-A and Exhibit 5-A?

Mr. Rodriguez Antongiorgi: There are two papers. The check and the vouchers. Showing the witness Exhibit 3, first. Mr. Goyco, will you please tell us what intervention you had in the issuance of these checks and we are referring now to Exhibits 4 and 5—in the issuance of these checks and the delivery of the same, as a representative that you were of the Serralles Industries? What intervention you

had in that? What did you do? A. According to the Article 6, a welfare fund was created in the amount of $15,000.

Mr. Perez Marchand: I beg your pardon, sir, the answer is not responsive. He has been asked what participation he had.

The Court: I believe that's preparatory. He can continue.

A. I took part in the negotiation of the labor contract and when the labor contract was signed by the parties there was the check for the $15,000 which was prepared by the cashier, and since it was signed, the labor contract, it was given to Mr. Arroyo by our administrator in my presence.

Q. It was given to him in your presence by your administrator, the administrator of Serralles Industries? A. Exactly.

[38] Q. In your presence? A. In my presence.

Q. It was handed personally to him, to Mr. Arroyo? A. Yes, in my presence.

Q. Was there any reason for giving that check personally to him, and not delivering it to the union, if you know? A. The labor contract was signed during the morning, and he had a meeting at night, an assembly, to tell the laborers about the labor contract, and he wanted to show them the check with the welfare fund in that assembly.

Q. Fine. And what was the purpose of that welfare fund? A. The purpose of that welfare fund was to pay for medical—

Mr. Romero: Your Honor, the purpose of the welfare fund.

The Court: The document speaks for itself. You may read it to the jury. Objection sustained.

Mr. Rodriguez Antongiorgi: I will read it to the jury.

Q. How was that fund to be administered? That $15,000?

Mr. Romero: Objection, Your Honor.

Mr. Rodriguez Antongiorgi: What's the objection?

Mr. Romero: You are asking how was it to be administered, bringing irrelevant evidence to the trial. The administration isn't in issue under the indictment, which charges Wadelmiro Arroyo with having received $15,000 on or about February 24, 1953. On a submitted bill of particulars, the [39] District Attorney told me that Wadelmiro Arroyo had received two checks, each for $7,500 on the same date, made out to the order of the union and the prosecution is now limited to its proof of handing the checks to Wadelmiro Arroyo, and the receiving of the checks. What the administration was of the welfare fund is not in issue. He has merely charged Wadelmiro Arroyo with having received some money forbidden under section (b) of Article 186 of Title 29, which says, "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

The same thing holds for the employer. In other words, this is decided in the case of J. B. Ryan, 100 L. Ed. 272. In this case the offense is one that is *malum prohibitum*. There is no question of intention, or what the representative did with the money. You have to prove only whether he did receive the money in violation of section (b), and the United States Attorney is revoking the defense which pertains to the defendant, as was said in this court in the case of Waterman v. *Mejias*, that the defense of the defendant, by the mere denial of that defense bringing in evidence which is irrelevant and immaterial. The test for relevancy and materiality is this, whether the evidence to be brought into the case has a rational and logical connection with the accusations in the indictment. [40] What Wadelmiro Arroyo's intention was in the administration of the welfare fund has no bearing on the terms of the indictment. It would result in a fatal variance, and the administration of

the welfare fund—once he accepts the welfare fund he would be a trustee. It would have a relation of trust, and whatever he did then, it would not be a relationship between representative and employer which was decided in *People* v. *Tilden*, decided under the New York law and under the case of *United Marine Division* v. *Essex Transportation Co.*, 216 F(2) 410, "We think that in this instance the promise of the employer (if indeed the promise was made) was not a promise 'to any representatives of any of the employees'. The promise alleged was to pay these trustees. These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund."

In other words, the management of this welfare fund is a matter of a collective bargaining agreement which is settled. Whether that is mismanaged or not, is another question. It is not the indictment in this case. If Wadelmiro Arroyo did something wrong with the management, the employers would issue an injunction to prevent him from administering it any more the way he was doing, or charge him with having done something with the welfare fund, but this is a criminal case, and we must stick with the law. The law says he can not receive any money from the employer. That's the only [41] thing that can be proved, that he received the money or did not receive the money. The managment is completely irrelevant in this case.

Mr. Rodriguez Antongiorgi: It is very appropriate that they cited the *Ryan* case, because it is right in point. Justice Clark, I have it right here, on the point of welfare funds, the Supreme Court says, interpreting whether the president of the union was a representative or not of the union, it says, "Further, a narrow reading of the term 'representative' would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the

demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit."

In other words, the *Ryan* case strictly says by unanimous opinion of the Supreme Court that the welfare fund has to be administered under provisions of Section 186 of the Act, and we negative Section 186 of the Act, so it is very pertinent to the Government's case to prove the mismanagement of the fund, and the case cited by my colleague of February 27, 1956, is exactly in point.

Mr. Romero: In the *Ryan* case the facts are that Ryan received some cash payments. He received $1,000 in December of each year from 1946 to 1951, and $500 in April 1951. The issue of the welfare fund was not in issue in this case. What [42] the Court is saying is discussing the statute, and the same Court says when it talks about the representatives, that is what we try to bring here, among other things which will be raised later on, when he is charged with receiving checks that the union received, because the Court says there is two types of representatives, an individual representative, that is of the union, and the officer that has power to deal with the employer. Here Wadelmiro Arroyo is an individual representative and he is trying to say that Wadelmiro Arroyo received the checks which the union received.

The Court: Let me see the *Ryan* case. The Supreme Court construed the statute in this case, and construing the statute the Supreme Court said that Congressional intention to the effect, to avoid that contributions by employers to welfare funds which were in the sole control of the union or its officers and could be used as the individual officers saw fit, was an evil that Congress wanted to avoid and that this statute was adopted for that purpose, so it may be material. It may be material—

Mr. Romero: But—

The Court: The Court is ruling, Mr. Romero.

Mr. Romero: I am sorry, Your Honor.

The Court: It may be material to the case here to establish whether the agent of the welfare fund was merely a sham and that the money was not going to be used for that purpose, [43] but was going to be used not as provided by the Taft-Hartley Law, but at the whim of the officer, so to that extent this evidence is material. Now, you still have the question that you may raise later when the case has to be submitted to the jury. Whether it has the necessary weight to establish the commission of this crime, or else whether it is only compatible with the commission of a local crime which you are not dealing with here. So the objection is overruled.

Mr. Romero: May I bring this other point? On the intention of Congress in that case, where the Court decides it after that they finished the discussion of the intention of Congress, and the Court says—I have Lawyers' Edition, and I think you have United States Supreme Court Reports, it says toward the end, "as the statute reads there appears to be a criminal provision, malum prohibitum which outlaws all payments with stated exceptions."

Mr. Rodriguez Antongiorgi: I surely agree on that.

The Court: What page?

Mr. Romero: That case is 276 of Lawyers' Edition. I don't know the other page.

Mr. Rodriguez Antongiorgi: I have that part marked also in pencil. It does not even require criminal intent. It is a public welfare crime. That's all it says.

The Court: Yes. Reconsideration denied. You may answer.

[44] Q. I think the question was, will you please tell us how was that fund created, pursuant to that collective bar-

gaining agreement, to be administered? A. By representatives of the labor union and the employer.

Q. Who was to be the representative of the union? A. Mr. Wadelmiro Arroyo.

Q. Who was to be the representative of the employer? A. Me.

Q. Now, did you participate in the administration of the fund? A. No, sir.

Q. Will you please explain why you did not participate in the administration of the fund? A. Because the two checks for $15,000, instead of being deposited in the account previously opened at the Banco de Ponce in 1952, were deposited by Mr. Arroyo in another bank.

Q. Were you asked to participate in the sense of countersigning checks out of this new account that Arroyo opened? A. Yes, I made efforts.

Q. Will you explain what efforts you made to comply with your part of the agreement as an officer of the welfare fund? A. As soon as I knew the money was deposited in another bank, I had many interviews with him in regard to that.

Q. What happened in those interviews? Tell us. A. Well, his opinion was that he was supposed to administer [45] the welfare fund alone, not as in the previous year.

Q. That was his contention? A. His personal opinion.

Q. His personal opinion? A. Yes. So I informed the management about that, and our lawyer, and they wrote letters to him and wrote letters to the local banks at Ponce to see in which bank he had deposited the $15,000, and we found later he had deposited it in the National City Bank, and later removed the account from that bank and put the rest of the money in the Banco de Ponce, together with the general fund of his labor union.

Q. And who issued all checks pertaining to those accounts to your knowledge?

Mr. Romero: Objection, Your Honor, he is not the best evidence.

Mr. Rodriguez Antongiorgi: I am asking if he knows, but that's all right.

Q. Did you counter-sign any of the checks issued pursuant to that? A. No, sir, none of them.

Q. And your explanation is that he refused to let you do your part? A. He refused to let the representative of the employer take part in the administration of the welfare fund.

Q. You referred to the previous welfare fund. In that [46] fund, who used to sign the checks for the other fund, the 1952 fund? A. In the 1952 labor contract the same fund was created and was deposited in Banco de Ponce as a trust fund, and Dr. Clavell who was the companion, the other member appointed by the employer, was to sign the welfare fund checks.

Q. That was in 1952, the previous fund? A. Yes, and on the part of the labor union Wadelmiro Arroyo would sign the checks.

Q. They were counter-signed also by Dr. Clavell? A. Yes, both signatures appear in the welfare fund checks in the year 1952.

The Court: That was the previous welfare fund, wasn't it? A. Opened for the first time.

Q. You said you made all kinds of efforts to make the defendant Wadelmiro Arroyo comply with the agreement. How many times did you talk to him about complying with the agreement? A. He visited me all the weeks during the following month after the checks were given to him, and we talked it over many times.

Q. And you say that the attorney for the company wrote to the bank and to Arroyo? [47] A. Not the attorney. We wrote our attorney, but it was our administrator who wrote to the different banks of Ponce to get information

where the money was deposited and what had happened to that money, and we received information from those banks.

Q. Now, after that money was deposited there in those two banks, and as you have testified in your efforts to do your part of the agreement which were fruitless, did you have any control whatsoever of that fund?

Mr. Herrero: That question is begging the answer from the witness. Objection.

Mr. Rodriguez Antongiorgi: If he had control the only way he can answer is yes or no. What control he had.

The Court: Perhaps control may be a conclusion. You may change the question in the sense of what intervention did he have, or could he have.

Q. What intervention, if any, did you have after the money was deposited in there? A. Absolutely none.

Q. I have no other questions now.

Cross-Examination

By Mr. Romero:

X-Q. Did you say previously that other members of the labor union—? A. I beg your pardon?

[48] X-Q. You said that other members of the labor union were employees of Central Mercedita and Puerto Rican American Refinery? A. Yes.

X-Q. Do you know of other labor union members that are not employees of Central Mercedita and Puerto Rican American Sugar Refinery? Aren't there other agricultural laborers, members of that union, which are not employees of the Mercedita and Puerto Rican American Refinery? A. Well, that's a separate body of employees, because they are agricultural employees.

X-Q. But they are members of the same union, are they not? A. I understand that is so.

X-Q. Because you said they were only employees of the

Central Mercedita and Puerto Rican American Refinery? A. Well, in this case we are dealing with the employees of the two corporations.

X-Q. When you say Wadelmiro Arroyo visited you each week at Central Mercedita? A. At my office.

X-Q. At Central Mercedita, your office, after he received those checks? A. Yes.

X-Q. How often did he used to visit you? A. For two or three days a week, he went there to look [49] for the dues and the list of employees paying such dues.

X-Q. He did this for how long, would you say? A. For all the year.

X-Q. Isn't it true that Wadelmiro Arroyo in 1953 was forbidden the entrance into Central Mercedita? A. That was at the beginning of 1954.

X-Q. At the beginning of 1954? A. More or less.

X-Q. So it wasn't in 1953? A. Well, there is a letter we sent prohibiting the entrance to the grounds.

X-Q. Do you have personal knowledge of that letter? A. I have personal knowledge and he has the letter.

X-Q. What date was the letter? A. More or less at the end of 1953, or the beginning of 1954—more or less.

Mr. Romero: That's all, Your Honor.

The Court: Any other questions to the witness? No more questions?

Mr. Pérez Marchand: If it may please the Court.

The Court: For the future, I should inform counsel for the defendant that as per a rule of this Court, examination or cross examination of a witness, when there are two or more attorneys and there is only one defendant, must be made by only one of the attorneys. That does not mean that it must be the [50] same attorney. This witness may be cross examined by Mr. Romero Barcelo, and the next by Mr. Pérez Marchand, but as regards one witness the examination should be conducted by only one attorney.

Now, I will permit Mr. Perez Marchand to ask a few questions to this witness.

Mr. Perez Marchand: Thank you, Your Honor.

Cross-Examination Continued

By Mr. Perez Marchand:

X-Q. When you spoke of the 1952 welfare fund, Mr. Goyco, which was of course a previous dealing, did you have in mind that when the 1953 welfare fund was established the 1952 fund had been liquidated? A. I understand there was a balance in that account pending.

X-Q. Yes. Now, isn't it true that when you have a welfare fund of the nature of the one referred to in this case, you may, you don't have to, deposit the funds for a subsequent agreement in the previous account, and you may deposit that money in a new account in the name of the new welfare fund? A. If it is agreed between the representative of the union and the employer, it is so, but that is not the case.

X-Q. Was it in this case agreed that it should be done differently? A. It was not agreed that it was not to be different. It was agreed that it was to be the same as the previous year.

[51] X-Q. You mean to tell me that the 1953 welfare fund specifically provided that the fund would be the same as the 1952 fund? A. Well, the sum of money was identical.

X-Q. The sum of money was identical. Were the uses identical? A. The uses were identical, more or less.

X-Q. More or less. Was there any agreement to the effect that this new fund must have its moneys deposited in the old welfare fund? A. When the checks were given to him, there was a condition that

X-Q. Does it appear from the vouchers attached to the checks? A. No, it does not appear from the vouchers.

X-Q. Does it appear in the letter of the agreement? A. Not in the labor contract.

X-Q. Nor in the letter of the welfare fund? A. No.

X-Q. So, what you are giving us is your impression? A. Not my impression. It was the mutual understanding of the parties.

X-Q. But it was an understanding that was not in any way expressed in writing? A. Not in writing.

X-Q. Not even in the vouchers accompanying the checks? [52] A. But verbally.

X-Q. Not even in the vouchers? A. No, but it was understood by both parties.

X-Q. So when Mr. Wadelmiro Arroyo deposited the 1953 welfare funds in a different bank and in a different account for the welfare fund, you say that he did not consult you? A. In no way.

X-Q. Did he have to consult you to make that deposit? A. Sure.

X-Q. How, and why? A. Because I was appointed representative of the employer and he was the representative of the labor organization to administer that fund.

X-Q. Will you please read the welfare fund agreement which you have before you, and tell me wherein this specific condition is established? A. A letter was sent to him in regard to that.

X-Q. How do you know a letter was sent to him? A. Because during the negotiation he appointed himself, or we assumed that the union appointed him representative of the welfare fund, and he knew during the negotiation that I was appointed by my employer as representative.

X-Q. Does the agreement say that? A. Not the labor contract.

X-Q. No, I mean the welfare agreement? [53] A. Not the welfare agreement.

X-Q. The welfare fund is a consequence of the labor

agreement, isn't it? A. Not a consequence. It is a part of the labor agreement.

X-Q. Could you have one without the other? A. No, because it is an economic concession obtained by the labor organization from the employer during the negotiations.

X-Q. You could have a labor contract without a welfare fund, couldn't you? A. Well, there are many cases, but this is not the case.

X-Q. My question is—

Mr. Rodriguez Antongiorgi: His answer is very responsive, Your Honor. He is answering.

X-Q. You have been as you said the labor relations officer of Central Mercedita and Puerto Rican American Refinery Company for a number of years, haven't you? A. Yes.

X-Q. And you have intervened in more than one welfare agreement? A. Well, I have been intervening and I discuss annually about six labor contracts.

X-Q. Yes, and my question to you is to tell me from your experience if you can draw and enter into a labor contract that [54] does not contain a welfare agreement? A. All the labor contracts that have been negotiated by me, the welfare fund is part of the labor contract.

X-Q. Were you labor relations officer in 1950? A. Yes, sir, since 1940.

X-Q. When did the welfare fund agreements begin in Puerto Rico? A. It depends upon the negotiations or the dealings between the labor union and an employer. For example, I know at the docks before, many years before we made that concession, had that welfare fund. For example, we began in 1951, giving the first welfare funds to a labor organization and since that time up to date that has been negotiated with the labor organizations.

X-Q. Isn't it a fact that prior to 1950 there was never in Puerto Rico a welfare fund agreement annexed or attached to or made a part of a labor agreement? A. Well, I am a

member of the Labor Committee of the Sugar Production of Puerto Rico, and I understand that more or less about that year began discussions and negotiations of the Sindicato Azucarera and the Sugar Producers regarding that fund.

X-Q. Could you state for the record, since when have these two enterprises herein concerned, Central Mercedita and Puerto Rican American Refining Company, negotiated welfare fund [55] agreements as a part of their labor agreements with the unions? A. Since 1951, exactly.

X-Q. And how and in what manner have the moneys destined to the welfare funds been paid into the union, or deposited in the banks? A. Well, that's according to a "reglamento" made by the parties.

X-Q. A regulation of the parties? A. Yes.

X-Q. That is, it is an essential part of the agreement? A. Well, it is an essential part of the agreement, a part of the labor contract, the welfare fund.

X-Q. Now, I ask you where in that labor contract, and in that welfare fund agreement, you find that stated? A. According to that labor contract you find that stated in Article VI.

X-Q. You have it before you. Please read it, and tell me.

Mr. Rodriguez Antongiorgi: That's what I asked him, and they objected that the thing speaks for itself, and now they are asking, but I am very glad that the thing is coming out.

The Court: You are not objecting?

Mr. Rodriguez Antongiorgi: No, I am not objecting. That's what I wanted.

The Court: Do you have the translation there?

[56] The Clerk: It is attached to the other one.

The Court: May I have the one in English? You have it in English. I have already read it. Any other questions?

Mr. Perez Marchand: I am waiting for the gentleman to show me where in the contract or the welfare agreement is there any stipulation as to who and how the welfare fund or moneys for the welfare fund must be deposited? A. As I told you before, there is no such thing in the agreement.

X-Q. There ain't such an animal? A. Yes.

X-Q. Now, Mr. Goyco, you stated that Mr. Wadelmiro Arroyo was at no time impeded from entering the premises of Central Mercedita and Puerto Rican American Sugar Refining Company and that he used to go regularly to your office in Central Mercedita?

The Court: He has already answered that. Mr. Romero asked him, and he said in 1954 he was prevented from going. Of course, if I permitted you to ask some questions of the witness it isn't to repeat the same questions Mr. Romero asked.

Mr. Perez Marchand: I beg the Court's tolerance, because my impression is that he answered that all through 1953 he was permitted to go to Central Mercedita?

Mr. Rodriguez Antongiorgi: I beg to strike this out. He was very clear he was prevented from coming in after all [57] this happened, in 1954. I appeal to the record.

X-Q. How about the year 1953? A. The year what?

X-Q. Was Mr. Wadelmiro Arroyo free to enter the premises? A. Yes.

X-Q. During 1953? A. Yes, until he received a letter at the end of the year that he was not allowed to enter.

X-Q. Do you remember having visited the union office for some negotiations during the month of August 1953? Because Mr. Arroyo was not allowed on the premises of Central Mercedita? A. No. I received a letter, or the management received a letter asking that a representative of the employer visit his office so that he would show us there how he spent the $15,000 of the welfare fund. So a bookkeeper, two bookkeepers from the general office and myself

went to his office and saw the cancelled checks and different invoices in regard to the disposition, the disbursement of the $15,000 of the welfare funds.

X-Q. Having stated that since 1951 all labor contracts at Central Mercedita have contained a welfare fund agreement, you know by whom and how the funds pertaining to each welfare agreement have been deposited? A. Yes, by the companion, another member of the employer, [58] in the welfare fund, it was deposited in 1952.

X-Q. Since you have a memory of the various agreements, I will ask you who deposited it and how in 1951? A. I don't recall exactly the person who deposited it.

X-Q. Do you recollect 1952? A. Yes.

X-Q. Who did it? A. Dr. Luis Clavell, representative of the employer.

X-Q. Who did it in 1954? A. In 1954, Dr. Luis Clavell.

X-Q. And in 1955 and 1956? A. In 1955 and 1956, Dr. Clavell.

X-Q. In what banks, if you remember? A. In the Ponce bank where the original account was established in 1952.

X-Q. When you said that Wadelmiro Arroyo had refused to allow you to act with him or check upon his activities, did this happen within the premises of Central Mercedita, or outside the premises? A. In my own office, at Central Mercedita.

X-Q. During 1953? A. Yes sir.

X-Q. Isn't that during the time he was prohibited from going there?

Mr. Rodriguez Antongiorgi: Objection again. That's been [59] gone into two or three times.

The Court: Yes. You may answer the question. A. No, he was prevented from entering at the end of 1953 or beginning of 1954, for the year 1954 only.

X-Q. That's why I asked you if he refused to allow you to check during 1953? You said yes, in your office?

Mr. Rodriguez Antongiorgi: Except it should be clarified that this all happened in February, the beginning of 1953, when the checks were deposited in there. The fund was administered in February, March, and April of 1953.

The Court: He has sufficiently answered that question.

Mr. Rodriguez Antongiorgi: He is trying to confuse all this.

The Court: Do you have many more questions of this witness, Mr. Perez Marchand?

Mr. Perez Marchand: No, sir. I rest. No more questions.

Mr. Rodriguez Antongiorgi: I have a few more questions.

The Court: Well, it is five minutes after 12:00.

Mr. Rodriguez Antongiorgi: It will be about five minutes, probably.

The Court: All right.

Redirect Examination

By Mr. Rodriguez Antongiorgi:

Q. Now Mr. Goyco, referring to the collective bargaining agreement, if I may have the English translation, I am reading [60] from the collective bargaining agreement, Article (6). It says, "This welfare fund shall be administered by a committee that will be appointed by mutual agreement between the Union and the Employer." Isn't that the committee of which you have been talking, that you were the representative and Mr. Arroyo was supposed to be the representative? A. Yes, sir.

Q. That's part of the collective bargaining agreement, Article (6), as I read it? A. Yes, sir.

Q. In the subpoena I issued to you, I don't know if you have it, I asked you to bring that letter of February 20, 1953 that you mentioned to Mr. Perez Marchand, and you told me this morning that it was impossible to locate it, and

you brought me a photostatic copy. That was a letter in which the two persons were designated? A. Yes.

Q. Is this the document that you brought me?

Mr. Perez Marchand: May it please the Court, there is something incongruent in what I hear from my colleague. If the original has not been placed, there is a photostatic copy of the original?

The Court: That's not unusual. The bank, as soon as they receive a document, they make a photostatic copy. The original may be lost, still they may keep the photostatic copy. He says [61] he brought the photostatic copy. I don't know how it was made. You have the opportunity of examining the witness as to that, but I believe that is going to take more than the five minutes that you say. We will do that this afternoon. It is unnecessary to keep the jury now if we are coming back this afternoon.

* * *

[63] *Redirect Examination of Mr. Goyco Continued*

By Mr. Rodriguez Antongiorgi:

Q. Mr. Goyco, this morning you were testifying and I believe I asked you in your subpoena—the Government had asked you to bring with you an original or copy of the letter of February 20, 1953, addressed to the defendant as president of the union in which you notified him of the members of the committee to administer the fund. You told me this morning when you came in that you had obtained this. Or rather, will you tell me what that is? A. As a matter of fact, the original of the letter is in the files of the labor organization.

Q. Yes, it is addressed to them. Is that a copy? A. It is a photostatic copy of which we notified the union of my appointment as representative to the welfare fund in 1953.

Mr. Rodriguez Antongiorgi: Can this be identified for the Government.

The Court: I believe it is Identification 6 for the [64] Government.

[A photostatic copy of a letter dated February 20, 1953, was marked Identification 6 for the Government.]

Mr. Rodriguez Antongiorgi: I believe counsel saw this this morning. I offer this in evidence, Your Honor.

The Court: No objection?

Mr. Perez Marchand: I would like to have a few questions asked to the witness before it is admitted.

The Court: Then the ruling on the admissibility of the letter is withheld until Mr. Perez Marchand asks some questions.

Recross Examination On Identification 6

By Mr. Perez Merchand:

The Court: You are going to ask questions about this letter?

Mr. Perez Marchand: About this letter.

X-Q. May it please the Court, I ask the witness to tell me whether this is a photostat of the original, or a photostat of a copy of the original? A. A photostat of the copy.

X-Q. Where is the copy, from which this photostat was made? A. That was from the files of our attorney.

X-Q. Of your attorney? A. Yes.

X-Q. You mean Mr. Orlando Antonsanti? A. Yes, sir.

[65] X-Q. And why did you say that this letter was sent to the defendant? A. Notifying of my appointment as representative of the welfare fund, for the year 1953.

X-Q. And the welfare fund referred to in that letter is the one now in the Court under Exhibit 3, is that right? A. I don't know if it is Exhibit 3, but that is in the labor contract.

X-Q. The labor contract and the welfare fund contract? A. Yes.

Mr. Perez Marchand: Our objection, Your Honor, will

be to the secondary character of the evidence, and that according to the best evidence rule we think that the Government could have produced a signed copy or a photostat of a signed copy of the letter. So for that reason we make a formal objection.

Mr. Rodriguez Antongiorgi: Your Honor, the Government did all that it could, issued a subpoena *duces tecum* asking Mr. Goyco, who is in charge of all those documents, to bring that document and now he has testified as to that. The Government can do no more, but if Mr. Goyco can produce the original I would be very happy. I would be very happy to have the copy from which that was made.

The Court: He says a photostat was made from the files of Mr. Antonsanti.

Mr. Rodriguez Antongiorgi: Then I will ask the Court to [66] issue a subpoena that Mr. Antonsanti come as a Government witness with the copy from which this was made.

The Court: Yes. Mr. Antonsanti, the Government wants you to appear as the Government's witness with your files having a carbon copy of this letter which the witness says that this photostat was taken from your carbon copy of this letter, so that the carbon copy may be produced, if you have it.

Mr. Antonsanti: If I know what letter we are talking about, I would be glad to produce it, Your Honor.

The Court: You may have this.

Redirect Examination continued

By Mr. Rodriguez Antongiorgi:

Then I withdraw this identification. I will give it to Mr. Antonsanti and then he can brings the copy. Anyway, Mr. Goyco, you were named as a representative of the employer in this committee? A. I was named and the union named Mr. Arroyo.

Q. One last question. I want to ask, I think you answered it before—in accordance with these exhibits which are Exhibits 4 and 5 for the Government, and the corresponding vouchers and the other supporting paper, the sole purpose of that money was for that benefit fund? The sole and exclusive purpose? A. Absolutely.

Mr. Rodriguez Antongiorgi: That's all, Your Honor.

The Court: Any other questions?

Mr. Perez Marchand: If the Court will allow me, I would [67] like to question the witness on one particular point of his redirect.

Recross Examination

By Mr. Perez Marchand:

X-Q. Mr. Goyco, if you were present at the moment of signing this agreement, and also present at the moment of delivering the checks, could you tell us who else besides you were present?

Mr. Rodriguez Antongiorgi: I object. That wasn't the subject of redirect. If we are going into the original matters.

The Court: Yes.

Mr. Perez Marchand: In redirect the witness was asked more than once about how things happened, and how the checks were handled.

Mr. Rodriguez Antongiorgi: He testified that in my original testimony, and then he was cross examined.

The Court: Not on redirect.

Mr. Perez Marchand: Then I beg to be allowed to ask it.

The Court: I will permit the question.

Mr. Perez Marchand: Thank you.

(The question was read back by the reporter.)

A. From the employer, was present Mr. Aragon, and Mr. Arroyo from the labor union. There was Dionisio Rivera,

Dolores Ventura Rosa, Armando Rivero from the labor union, and the labor contract was signed by Mr. Felix Juan Serralles and Mr. Aragon the administrator.

[68] X-Q. You say that Mr. Serralles was present? A. Yes.

X-Q. He was present? A. He was present in his office.

X-Q. His office may be in the Vatican. I mean, at the moment of delivering the checks and signing the contracts? A. I will tell you the way the contract was signed. It was signed by the labor representatives; then I took the contract to the floor below where Mr. Serralles' office was, and he signed the labor contract, and—

X-Q. Was he present in the delivery of the checks? A. No.

X-Q. Who was, or who were present there in the representation of the companies concerned at the moment of delivering these checks? A. As I said this morning, and will repeat now, the administrator, Mr. Aragon, and I.

X-Q. That's for the companies? A. Yes.

X-Q. And who were present then and there for the labor union? A. Well, I said that a moment ago, but I can repeat it.

X-Q. Please? A. Mr. Arroyo, Mr. Armando Rivero, for the I.L.A. Mr. Dolores Ventura Rosa.

[69] X-Q. Do you remember who made the personal delivery of the checks? A. Personally?

X-Q. Yes? A. The administrator, Mr. Aragon.

IVAN ALVAREZ DIAZ

a witness called by and on behalf of the Government, after having been first duly sworn was examined and testified as follows:

Direct Examination

[70] By Mr. Rodriguez Antongiorgi:

Q. Please state your full name for the record? A. Ivan Alvarez Diaz.

Q. What is your occupation, Mr. Alvarez? A. I am now in charge of Clubman's Store, as manager.

Q. In San Juan the Clubman Store? A. In Santurce, Stop 16.

Q. Calling your attention to the early months of 1953, February, 1953, where were you employed? A. I was a sub-accountant at the National City Bank.

Q. Where? A. In the National City Bank, in Ponce.

Q. Among your duties as a sub-accountant, was one of them opening accounts for clients? A. Opening checking accounts, that's right.

Q. Checking accounts? A. All kinds of accounts.

Mr. Rodriguez Antongiorgi: May I have this marked as Identification 7 for the Government?

[A signature card of the National City Bank was marked Identification 7 for the Government.]

Q. Will you please tell me what this is, that I am showing you? A. A signature card.

Q. What is that? [71] A. Just a registered signature of a person who opened an account in the bank.

Q. Was that opened before you? A. That's right.

Q. By whom? A. By Mr. Wadelmiro Arroyo.

Q. In what capacity? A. As the president of the Union "Union de Trabajadores de Factoria, Refineria, y Ramas Anexas de la Industria Azucarera."

Q. When was it opened? A. February 24, 1953.

Q. May I have this marked as Identification 8 for the Government.

[A Resolution of the Union was marked Identification 8 for the Government.]

Q. Will you please tell me what this is? Showing the

witness Identification 8? A. That's a Resolution from the union authorizing Mr. Wadelmiro Arroyo to draw checks against the union.

Q. Was that part of the account you just referred to? A. That's right.

Q. Part of the papers? Please have this marked Identification 9 for the Government.

[A ledger was marked Identification 9 for the Government.]

[72] Q. Will you please tell me what this is? A. That's a ledger.

Q. What's a ledger? I don't know much about banking. Tell me what it is. A. A ledger is a paper. We use it on yellow paper to make the records of the deposit and withdrawal during the time the account is opened.

Q. To what account does that refer? A. To the Union de Trabajadores de Factoria, Refinèria y Ramas Anexas.

Q. Is that the same one to which that signature card and the supporting papers refer? A. That's right.

Q. May I have this marked?

The Clerk: This is Identification 10 for the Government.

[Manager's check of National City Bank was marked Identification 10 for the Government.]

Q. Will you please tell me what this is? Showing the witness Identification 10 for the Government? A. That's a manager's check of the National City Bank of New York, corresponding as a balance outstanding of Union de Trabajadores de Factoria, Refineria y Ramas Anexas. This check corresponds to the balance. We closed the account with that check.

[73] Q. In other words, there was an account opened and that was a check closing that account, a manager's check? A. Yes, a manager's check number 113,743.

Q. In what amount? A. $9,813.89.

Q. What's the date? A. March 26, 1953.

Mr. Romero: Your Honor, we urge—

Mr. Rodriguez Antongiorgi: I offer them in evidence.

Mr. Romero: We accept Identification 7, and we accept Identification 8. We just want to call attention to the fact that this document has been cut here. It may be there were more signatures of union officers. We object, Your Honor, to the presentation in evidence of Identification 9 and 10. Number 9 is, as we have already said, a ledger sheet saying how the balances were taken and the checks drawn against the account, and number 10 is a manager's check to the order of the union.

The Court: You object to it?

Mr. Romero: Yes, on the basis of the relevancy and materiality of the evidence, that what has happened here, the evidence here is in March and the check is in March, and the indictment cites a check on or about February 24th, that Wadelmiro Arroyo received some money from the employers.

Mr. Rodriguez Antongiorgi: Except that when the account [74] was opened coincides with when the $15,000 were received. The checks or withdrawals were afterwards.

Mr. Romero: The ledger sheet is all in March, and the check is in March, and we wish to tell the Court that the United States Attorney has all through this trial been trying to bring into this case evidence which is completely irrelevant and immaterial, and we wish to sustain again the fact that the indictment charges Wadelmiro Arroyo with having received some money on or about February 24th, but if he received it, what he did with the money afterwards is of no relevancy to this case. The accusation against Wadelmiro Arroyo is under, as we have read before, Section 186 (b), United States Code Annotated Title 29, and wish to state again our reasons why we think all this evidence is irrelevant and immaterial, and our reasons

for so believing is that this evidence would tend to prejudice the mind of the jury and it is evidence not supported by the accusation. In other words, it is completely irrelevant, and it is a fatal variance of the charges in the indictment. It is bringing into the case elements which are outside of the scope of the offense charged against Wadelmiro Arroyo.

The Court: So you object only to these two? You have no objection to the others?

Mr. Romero: Yes, Your Honor.

The Court: Your objection is not based on the admissibility [75] but rather on the burden or weight to be given to the evidence by the jury. As I understand the law in this case, and as I understand the pleadings and the position of the Government, it is to the effect that the only material exception which the defendant would have as regards this welfare fund is that the fund was lawfully created and actually in existence. So all this evidence is material to show in connection with the receipt of the checks already admitted without objection that the defendant received from these two corporations $15,000. Allegedly, that is the corporations' intent, that this payment was for a welfare fund to be administered as provided by the National Labor Relations Act, and as provided by the agreement, through trustees—one designated by the employer, one designated by the employees, and perhaps a third, I don't know if this provided for another or not, but I don't think it provided for another one. And that the withdrawals from that fund were to be made as required by the law and as determined by the trustees.

The witness, the last witness we had here, Mr. Goyco, testified that it had been agreed that the deposit for the welfare fund be made as had been done in the past, for the 1952 welfare fund; by the same parties, that the deposit be made in a specific bank, in the Banco de Ponce, by the

representatives or by the trustees, and that no check would be issued on that fund unless counter-signed, unless [76] signed by the representative of the union and counter-signed by the trustee representing the employer. So this evidence is material to show that those $15,000 were not deposited as required by law, and as required by the document in which the welfare fund was created, and as required by the agreement and it is material to show that this defendant made these deposits on which he could draw without the requirements of the law. And this is a chain in the circumstances that the Government has to bring. Objection overruled and all the documents are admitted and ordered marked Exhibits 7, 8, 9 and 10 for the Government.

[The documents in question, having been previously identified, were thereupon admitted in evidence and marked Exhibits 7, 8, 9, and 10 for the Government.]

The Court: In connection with the ledger, I may add that the ledger establishes that the original deposit was made on February 24, 1953, consisting of $15,000, and all the withdrawals periodically made until June 5, 1953. And of course this check in the sum of $9,813.89 which as per the testimony of this witness was the balance paid by the bank to the union in closing the account.

Q. Mr. Alvarez, under those documents—

Mr. Perez Marchand: I beg your pardon, if it may please Your Honor, I am going to ask for a reconsideration of Your Honor's ruling on the following facts and law. As Your Honor [77] has just about stated the welfare fund was to be administered according to its terms by a committee of men known as trustees, and referred to in general terms in Article (6) of the working agreement on February 21, 1953. But so far, not to this moment is there evidence before the Court as to how that administrative body of trustees was composed and by whom.

The Court: Well, there is evidence, the testimony of

Mr. Goyco who said that the fund was to be administered by two trustees, one designated by the union, Mr. Arroyo, and another designated by the employer which was himself, and that the fund was to be deposited in the Banco de Ponce like the other fund; that no withdrawal was to be made from that fund unless checks issued against it were counter-signed by the employer, that is, Mr. Goyco the representative of the employer. There is evidence as to that.

Mr. Perez Marchand: Our contention is, may it please the Court, there is no evidence so far as to how this board of trustees was constituted, insofar as the basis is its constitution according to Article (6), is that the parties must get together and decide on who the persons will be and the letter which purportedly was sent to Mr. Arroyo informing him and the union who would be the representative for the employers is not yet admitted in evidence.

The Court: But there is testimony by Mr. Goyco which is evidence, that he was designated the representative.

[78] Mr. Rodriguez Antongiorgi: I might point out to the Court that Mr. Goyco was very emphatic to the effect that the defendant refused to meet, to cooperate, to do anything. That was the testimony that we heard this morning.

Mr. Perez Marchand: Well, sir, be that as it may, we insist that upon the facts and the law applicable there is not yet a showing that there has been any violation of Section 186, Title 29, paragraph (b), as alleged. The alleged crime is that this man—

The Court: That's something to be determined after all the evidence is in.

Mr. Rodriguez Antongiorgi: I am sure if Mr. Perez Marchand is a little patient I will prove my case.

The Court: You can't ask that the Court reach a conclusion and invade the province of the jury. The Government must support its case otherwise we would not be here.

Mr. Perez Marchand: What we contend is that we are

already reaching conclusions without the sufficient evidence therefor. That's what we want to point out.

The Court: I am simply quoting from the law, the same law you cited, Section 186, Title 29. In sub-paragraph (a) it makes it a requirement that "such payments are held in trust for the purpose of paying either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on [79] retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;" and (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund,—" What the United States has pleaded is against the exception. The United States is negating the existence of the exception so they have the burden of showing that the trust fund did not exist as required by the law.

Mr. Rodriguez Antongiorgi: That's what I am trying to do, Your Honor.

The Court: And this evidence tends to prove it. I am not saying it proves it, but I am saying it tends to prove it, and therefore it is admissible. The motion is denied.

Mr. Rodriguez Antongiorgi: Mr. Antonsanti has very kindly brought the carbon copy. I don't know if counsel will stipulate or I will have Mr. Antonsanti take the stand.

Mr. Perez Marchand: He must identify it.

Mr. Rodriguez Antongiorgi: Then I will wait until I finish with Mr. Alvarez.

Q. Who was the only person authorized to withdraw from that account, under those documents? [80] A. Mr. Wadelmiro Arroyo.

Q. Did Mr. Arroyo have any other account with the bank? A. A personal account.

Q. With the same bank? A. That's right.

Q. Will you tell me what this is, this other document? A. It is a signature card verifying Mr. Wadelmiro Arroyo's own personal account.

Q. His personal account? A. That's right.

Q. Will you please mark this for identification.

The Clerk: This is Identification 11, and this is Identification 12 for the Government.

[The signature card and the ledger belonging to Mr. Arroyo's personal account were marked Identification 11 (signature card) and Identification 12 (ledger) for the Government.]

Q. Will you please identify this Identification 12 for the Government? A. It is a ledger belonging to the personal account of Mr. Wadelmiro Arroyo.

Q. And when was that personal account opened, and when was it closed? A. According to this, in April 2, 1952, and closed on April 28, 1953.

Mr. Rodriguez Antongiorgi: Your Honor, I offer this [81] in evidence. I will be willing to go to the bench and make an offer of proof as to its relevancy, out of the ears of the jury, to show the relevancy of this.

Mr. Perez Marchand: Objection.

The Court: Out of the ears of the jury, so the jury won't be inconvenienced by going upstairs.

Mr. Perez Marchand: Objection.

The Court: He is simply protecting the interests of the defendant.

[Counsel approached the bench.]

Mr. Rodriguez Antongiorgi: I offer to prove by this personal account that on at least two occasions the withdrawals from the union account and the deposits in his

personal account coincide, once for $500 and the other one for $600.

The Court: Will you repeat—

Mr. Rodriquez Antongiorgi: One, he made a check from the union account for $600 and had it deposited in his personal account, and on another occasion for $700.

Mr. Perez Marchand: Our objection is that the documents are completely irrelevant and immaterial to prove the charge against Wadelmiro Arroyo. That this card—or what is this, this identification?

Mr. Rodriguez Antongiorgi: That's his personal account card.

Mr. Perez Marchand: That this card is completely [82] ante-dated and is one year old at the time of the 1953 agreement. It has nothing absolutely to do with the issue before the Court.

The Court: But if the card refers to an account opened in 1952, which was still alive at the time of this period.

Mr. Perez Marchand: All right. That's our objection. With reference to this letter, our objection—

The Court: This has not been offered yet. What the Court has in mind, the crime is that he used the funds for his own personal benefit, and an important item of evidence is the transfer of funds from this account to his personal account.

Mr. Romero: To expand this argument, we wish to incorporate the argument previously stated as to relevancy and materiality.

The Court: Yes, you follow your same position.

[Counsel withdrew from the bench.]

The Court: Objection overruled, and the documents are admitted and ordered marked Exhibits 11 and 12 for the Government. I believe this is the same account, and by making one number that would be enough. You may put the number and say, consisting of so-many pages.

[The documents in question, previously identified as Identification 11 and Identification 12, were admitted in evidence and marked Exhibits 11 and 12 respectively.]

[83] Q. I would like to show the witness now Exhibit 9 and Exhibit 12. Now, Mr. Witness, I would like you to examine these two ledgers, one reflecting the union account, and the other reflecting the personal account. After examining those documents I would like you to refer to a movement or a transaction in that account dated March 16, 1953 in the amount of $600. See if there is a withdrawal from the union account on that date, March 16, 1953, for $600? A. For $600, March 16, 1953.

Q. Yes. I would like you now to examine the ledger account for his own personal account, and see whether there was a deposit for $600 in his own personal account? A. On March 16th, that's right, his personal account.

Q. Do you remember that? What happened there? A. He made a transfer from one account to the other.

Q. He drew a check from the union account and deposited it to his personal account? A. To his personal account, yes.

Q. Please examine and look at the transaction of March 20, 1953, of a check in the amount of $700? A. He made a transfer on March 20th.

Q. What happened on both accounts on March 20, 1953, with a check in the sum of $700? A. He made a transfer of funds of $700 from the Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la [84] Industria Azucarera to his own personal account on the same date, for $700.

Q. I would like for you to examine now the ledger of the union account, and see whether there is a withdrawal of $400 on March 20, 1953? A. Is it a withdrawal of $400 on March 20, 1953?

Q. Is that correct? A. That is correct.

Q. One last question. At the time you were sub-account-

ant in the National City Bank in Ponce, were there microfilm machines in such a way that you could be able to have microfilms and photostatic copies of all checks? A. We don't make those then.

Q. And who has the cancelled checks of all those accounts? A. Mr. Wadelmiro Arroyo. Every one we sent by mail.

Q. You have the microfilms now? You did not have them at that time? A. At that time we didn't have the machine.

Mr. Rodriguez Antongiorgi: That is all.

Cross Examination

By Mr. Romero:

X-Q. May I see the one that refers to the establishment of the account in the name of the union, and the ledger for the union? Mr. Alvarez, will you please read the whole name of the account, in what name it was put? [85] A. Union de Trabajadores de Factoria, Refineria y Ramas Anexas afiliada I L A 1781, Plan de Beneficencia.

X-Q. What do you understand "Plan de Beneficencia", the welfare fund where this account was put, the welfare fund in the name of the union, for that specific purpose? Now, I want to ask you, how can you determine—

Mr. Rodriguez Antongiorgi: I cannot hear you. I am sorry.

X-Q. I am sorry. How can you determine by looking at the ledger of the union and then looking at the ledger of the defendant's account, how can you determine that one withdrawal is relative to the deposit in the other account? I mean, you said that happened in 1953. You say you deal with a lot of people in the bank, you must deal with quite a few people in the course of a year, probably thousands of people, and you remember a transaction of $600 or $700, a comparatively small transaction, and you remember specifically that that was a withdrawal from one account

and a deposit in the other? Can you honestly say you remember that transaction, specifically? A. I remember.

X-Q. What impression did it cause on you? A. It is so easy for me, because we don't have lots of that kind of accounts. Any transfer we always remember. If Juan Perez opens an account it is very simple, but when [86] you open that kind of an account, for example—

X-Q. What do you mean "that kind"? A. Union de Trabajadores de Factoria, Refineria y Ramas Anexas. You always watch any movements, any transfer of funds.

X-Q. Why do you watch it? Do you have a presumption against the unions? A. No, no presumption. Just to have everything, all the papers.

X-Q. You watch it more than another account? A. Not exactly. What can I say in English, specifically—

X-Q. There is no prejudice, but you watch it more? A. But we try to be much more conscientious—

X-Q. Because it isn't the same as— A. Just to avoid having any problem.

X-Q. Why would you think there would be any more problems with the union than any other clients? A. We don't usually have any problems at all with our clients.

X-Q. But you have a problem now? A. Well, we have it now, but we watch our steps.

X-Q. And in 1953 you remember specifically this transaction? A. Yes, I remember it.

Mr. Romero: No further questions.

[The witness was excused.]

[87] RAFAEL DIVERSE

a witness called by and on behalf of the Government, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name and occupation? A. Rafael Diverse, in charge of the current accounts department, Banco de Ponce.

Q. Showing the witness Identification 13 for the Government, will you please tell me what this is and what that represents?

[The signature card for Banco de Ponce was marked Identification 13 for the Government.]

A. This is the signature registry of Mr. Wadelmiro Arroyo, taken at the Banco de Ponce for purposes of withdrawals against the union account, the account of Union de Trabajadores de Factoria, Refineria y Ramas Anexas, Local 1781.

Q. When was that account opened? What date? A. March 26, 1953.

Q. With what amount of money? Showing the witness Exhibit Number 10 for the Government? Do you recognize that? A. Right.

Q. What is that? [88] A. This is a certified check of the National City Bank with which the current account was opened in the Banco de Ponce.

Q. May I have this identified? These various documents?

[Deposit slip with which the account was opened was marked Identification 14 for the Government.]

[Form for opening new account in Banco de Ponce was marked Identification 15 for the Government.]

[Ledger of current account in Banco de Ponce was marked Identification 16 for the Government.]

Q. Will you please—showing the witness Identifications 14, 15, and 16, tell me what these documents are? A. This is the deposit slip with which the account was opened in the Banco de Ponce. This is the form used at the bank for opening an account. And this is the ledger of the current

account from the date the account was opened until it was closed.

Q. Now, I would like to offer these documents in evidence, your Honor.

Mr. Perez Marchand: Objection on the ground that none of the four documents submitted has any relation whatsoever to the issue before this Court, and no mention is made in any of these documents of the welfare fund established by the working agreement of February 24, 1953. [89] Mr. Rodriguez Antongiorgi: Your Honor, the relation is very direct. The $9813 left from the welfare fund went over to that account, and they were afterwards mingled, as I informed the jury in my opening statement, with the funds in which the defendant was the sole person to control that account.

Mr. Perez Marchand: That may be the purpose, but that isn't what the documents show, and that is why we object to them as impertinent and wholly irrelevant and immaterial to the issue now before this Court.

Mr. Rodriguez Antongiorgi: It is the highest evidence. Even the deposit slip.

Mr. Perez Marchand: The highest evidence would be the checks drawn on the bank with the names of the endorsees and the drawers.

The Court: Let me see them.

Mr. Perez Marchand: From the letter of this paper there is no way except by a very flimsy implication to determine that they represent the use, good or bad, of the moneys of the welfare fund.

The Court: Is that all the objection?

Mr. Perez Marchand: Yes.

The Court: Objection overruled. This is a follow-up tracing of the proceeds of the original $15,000, the $9,813.89 delivered by this manager's check of the National City Bank, [90] Number 113,743, as the balance of that account

when it was closed, appears as per this deposit slip deposited in this new account with the Banco de Ponce on March 26, 1953. And the more important significance is precisely what the attorney says, that in the one in the National City Bank, as testified by the former witness on cross examination by Mr. Romero the name of the account contained the statement, "Welfare fund". Now, this account in the National City Bank does not even say that. It is deposited in the name of the Union without any reference whatsoever to any welfare fund. And the defendant appears as the person who made the deposit in the name of the union to open the account with the Banco de Ponce, the only authorized signature on that account, and then the ledger shows all the withdrawals from that account since it was opened until it was closed, and of course as to the cancelled checks you know that the bank does not keep the cancelled checks, that the cancelled checks are returned to the customer.

Mr. Perez Marchand: On the strength of what Your Honor just stated, we further object that it is a departure and a very fatal variance from the specific charge made in the indictment to the effect that Wadelmiro Arroyo's alleged crime was to receive, wilfully and unlawfully, $15,000 from Central Mercedita and Puerto Rican American Sugar Refining Company, on the 24th of February 1953. And we respectfully submit [91] that the Government is deviating into the channels of a charge or alleged crime of embezzlement, which is absolutely different and independent from the provisions of Section 186, Title 29, of the United States Code, and would, if at all, prove or be evidence to prove the crime to be tried in a local court and not in this court.

The Court: Reconsideration denied. The documents are admitted and ordered—

Mr. Romero: This is not a motion for reconsideration,

but merely an objection on the basis of the best evidence rule. The District Attorney has been trying to drive this case representing Wadelmiro Arroyo and the union as one person, as the same person. The evidence of the union certification stipulated by the parties, that this is a union certified and a body by itself. Wadelmiro Arroyo is merely a member of the union. The checks were in the possession of the union, and the District Attorney could, with a subpoena, have had those checks here because Wadelmiro Arroyo, even though he is president, could not deny bringing the checks here on the ground that it would incriminate him.

Mr. Rodriguez Antongiorgi: I have some checks.

The Court: Of course, it does not have anything to do with this because this is material evidence. It is admissible. That's all I have ruled. The fact that there may be some checks does not in any way prevent the Court from admitting this evidence. Reconsideration denied, and [92] Identifications 13, 14, 15, and 16 are admitted and ordered marked Exhibits 13, 14, 15, and 16 for the Government.

[The documents in question, having been previously marked for identification, were admitted in evidence and marked Exhibits 13, 14, 15, and 16 for the Government.]

Q. Mr. Diverse, do you have microfilm equipment for taking photographs of checks? A. Yes, sir.

Q. You do? Can I have this marked as Identification 17 through 20, these are various identifications, there are four of them.

[Check made out to Casa Pacheco was marked Identification 17 for the Government.]

[Check made out to cash was marked Identification 19 for the Government.]

[Check made out to J. A. Lind was marked Identification 18 for the Government.]

[Check made out to J. A. Candal & Co. was marked Identification 20 for the Government.]

Q. Showing the witness Identifications 17 through 20, will you please take a look at these photostats and tell me what they are, and what they correspond to? A. This is a check drawn by the Union de Trabajadores de Factoria, Refineria, y Ramas Anexas, Local 1781, signed [93] by Wadelmiro Arroyo, payable to Casa Pacheco in the sum of $600.

Q. What's the date? A. April 14, 1953.

Q. Will you do the same with the other checks, please? A. This is another check of the same union, signed by Mr. Wadelmiro Arroyo for $225. It is hard to read this—$275. The date is not clear.

Q. To whom? A. Payable to cash. It is endorsed by Eulalia Carbona.

Q. How about the other checks? Is that from the account of the Banco de Ponce? A. Yes, sir. This is another in April. The date is not legible, in 1953, signed also by Mr. Wadelmiro Arroyo, in the amount of $107 in favor of J. A. Lind.

Q. Will you please? A. This is a certified check drawn by the Union de Trabajadores de Factoria, Refineria y Ramas Anexas, Local 1781, dated April 9, 1953, signed by Mr. Wadelmiro Arroyo for $387.75, payable to J. A. Candal and Company.

Q. Now, Your Honor, as to all these checks except the cash one, which is relevant by itself, especially with the notation that he has there, the others, I offer to connect them with the purpose of the checks by other witnesses, but at this time I would like to offer them subject to that offer [94] that I make, or we can leave them here identified.

The Court: No, I will not rule on them until they are connected.

Mr. Rodriguez Antongiorgi: All right.

The Court: Ruling on the admissibility of those checks is withheld until it is connected by other evidence, unless there is no objection.

Mr. Romero: Excuse me, Your Honor, I couldn't hear.

The Court: Do you have any objection that they be admitted?

Mr. Romero: Yes, the same objection that we had, that they are irrelevant and immaterial.

The Court: All right. Of course the Court is not withholding the admissibility on account of the objection. The Court withholds admission because they have to be tied up with some personal business of Mr. Wadelmiro Arroyo.

Mr. Romero: Shall I repeat my motion as to relevancy and materiality?

Mr. Rodriguez Antongiorgi: I am not offering them. They are just identified. Can these be identified as Identification 21 and 22 for the Government?

[Letter to Banco de Ponce from Central Mercedita was marked Identification 21 for the Government.]

[Letter from Banco de Ponce to Central Mercedita was marked Identification 22 for the Government.]

[95] Q. Can you identify these documents? These letters that came with a subpoena that was issued to the Banco de Ponce? One is a letter from Central Mercedita, and an answer to that letter.

The Court: They came jointly with the checks?

A. This is some correspondence between Central Mercedita and the Banco de Ponce.

Q. Is that part of the records of the bank? A. Yes, sir.

Q. And it is part of the business of the bank to keep records like that? A. Yes, sir.

Q. I offer those letters, Your Honor. They refer to the account in general.

The Court: Don't say the contents until they are admitted.

Mr. Rodriguez Antongiorgi: I offer them in evidence.

Mr. Romero: Objection on the grounds that they are irrelevant and immaterial. I would like to have the Court read them.

The Court: Is is very material.

Mr. Romero: My reasoning is, as I explained before that this is drawing the case away from the issues of the indictment, that it is a fatal variance, that he is trying to prove an embezzlement, and introducing fatal prejudice, [96] bringing things which are not pertinent to this case to the minds of the jury.

The Court: This tends to establish that the welfare fund was never established as required by the law. I am not saying it establishes it, which is the exception—

Mr. Romero: Which is the defense.

The Court: And the Government is pleading the exception. And of course they are admitted under the shop book rule, as part of the records of a bank, and it is the usual practice of the bank to keep these records. They are admitted and ordered marked Exhibits 21 and 22 for the Government.

[Identifications 21 and 22, having been previously marked for identification, were admitted in evidence and marked Exhibits 21 and 22 for the Government.]

Mr. Rodriguez Antongiorgi: No more questions to Mr. Diverse.

The Court: Are you going to cross examine?

Mr. Romero: No questions of the witness, Your Honor.

* * *

[97] ELBA PACHECO

a witness called by and on behalf of the Government, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name? A. Elba Pacheco.

Q. Where do you live? A. In Ponce.

Q. Do you have any business? A. Yes, a furniture store.

Q. Where? A. In Ponce.

Q. Who owns that business, Mrs. Pacheco? A. My husband.

Q. And yourself? A. And myself.

Q. Are you presently in the business? A. Yes, I am the secretary of the corporation.

Q. What's the name of the business? A. Casa Pacheco, Inc.

Q. Do you know the defendant in this case, Mr. Wadelmiro Arroyo? A. Yes, I know him.

[98] Q. Do you see him in court? A. Yes.

Q. Please point him out? A. There.

The Court: Let the record show that the witness points to the defendant.

Q. I issued a subpoena to you, Mrs. Pacheco; did you bring some documents with you? A. Yes, the papers, the contracts.

Q. Did it have any business with the defendant Wadelmiro Arroyo—Casa Pacheco? A. Yes.

Mr. Romero: This evidence is irrelevant, on the basis that we have presented before, that this has no bearing on the issues, that it is bringing prejudice to the minds of the jury.

Mr. Rodriguez Antongiorgi: I will connect it, Your Honor.

The Court: Subpect to being connected. Objection overruled.

Q. Let me ask you this, did you ever receive a check in the amount of $600 from the defendant?

Mr. Herrera: Objection. He is begging the answer from the witness.

The Court: Objection sustained. You may change the [99] question.

Q. Please explain the business dealings you had with the defendant? A. We sold furniture to him.

Q. When did you sell that? A. In January 1952.

Q. And what happened? How did he buy that? A. On the installment plan, and after a few months he paid the balance of that account.

Q. When did he pay the balance? A. In April.

Q. Of what year? A. 1953.

Q. And what did you sell him? A. Furniture.

Q. What kind? Please describe it? A. Living room set, beds, springs, and mattresses.

Q. Do you have the supporting documents for those sales with you? A. Yes.

Q. Please give them to me. What is this? Will you please describe this? A. A refrigerator.

Q. But that's not a refrigerator. What does that represent? [100] A. A contract covering one of the sales.

Q. From whom? A. From Casa Pacheco to Wadelmiro Arroyo.

Q. When was that finally paid, the balance of the amount due? A. In April.

Q. 1953? A. 1953.

Q. How was that paid, in what form or manner? A. He paid in partial payments.

Q. The final payment? A. And the final and total payment of the balance.

Q. How did he pay? In Cash? A. In a check.

Q. In what amount? A. $600.00.

Q. Showing the witness Identification 17 for the Government, what is this, Mrs. Pacheco? A. It is a check.

Q. What check? Tell me what it is? Have you seen it before? A. Yes.

Q. What is that? A. A check to Casa Pacheco.

Q. When was it given to you? [101] A. In April.

Q. Is that the check you have referred to already, covering the refrigerator and furniture? A. The balance of the account.

Q. When was it paid to you? A. April 14, 1953.

Q. And with this payment there was closed the account that he had, for all that furniture he had brought from you, is that correct? A. The balance of that account.

Mr. Rodriguez Antongiorgi: Now I offer in evidence Identification 17.

Mr. Perez Marchand: We make similar objection to this on the ground that it is all proper evidence for a charge of embezzlement, but not in any way connected with the violation of Section 186, Title 29, United States Code, as the indictment of this case reads.

Mr. Rodriguez Antongiorgi: The purpose is to show the illegal use of funds from the welfare fund. It isn't to show embezzlement. That's not my jurisdiction.

The Court: Objection overruled. The document is admitted and ordered marked Exhibit 17 for the Government.

[The document in question, having been previously marked for identification, was admitted in evidence and marked Exhibit 17 for the Government.]

[102] Mr. Perez Marchand: We further object to the proposed evidence because on its face it does not have any reference whatsoever to the welfare fund which is the issue in this case, and it has no bearing on the charge propounded, which, incidentally, makes absolutely no mention of the use made by the defendant of the moneys which he is charged to have received illegally and wilfully.

The Court: The check is a withdrawal from the funds delivered by the employer of $15,000, and the evidence tends

to show that the money, that $600, was used for his personal benefit by the defendant in purchasing furniture, a refrigerator and other furniture, as identified by the witness. As said in the *Ryan case* precisely by the Supreme Court what Congress intended to prevent and prohibit by this provision of the Employer-Employee Relations Act was that the leaders of labor unions and the officers of labor unions receive money from the employers for their own personal use, and not for the benefit of the employees. That's what was said in that quotation this morning from the *Ryan case*. This evidence is material to show that. The defendant may show, of course, that this was for the union, it wasn't for himself.

Mr. Perez Marchand: Begging Your Honor's condescension, the *Ryan case* was that he received money for himself, which is the illegal part of the law, rather the crime, a form of subornation. The employer must not bribe the union through [103] its officers by giving them money, so Ryan fell within the law, or rather acted outside the law, and had to face the music. It was proven in that case he received money, not for the union nor for the welfare fund but for Ryan. That was the illegal way in which he received the money. In this case the charge is that he has received the money illegally and he received two checks. For whom? For him? No! For the welfare fund. The question now is, did he make a good use of the money? Or did he make bad use of the money? If he did make bad use of the money he is an embezzler, he must be charged with embezzlement, but not charged with violation of Section 186, sub-section (b) of Title 29.

Mr. Rodriguez Antongiorgi: Your Honor, I keep repeating this. You know the charge is not illegally receiving the money—it is the illegal receiving of the money not for the purpose provided for by the sub-section alleged in the indictment. That's the charge. Of course, this is a different

phase of the situation from the *Mejias case* we had here, and the *Ryan case* in New York, but that does not mean there isn't a violation when we charge, as we do in this case, that there is a violation in the illegal use of the welfare fund, and that's covered by this decision in the language Your Honor read this morning.

The Court: Motion overruled.

Mr. Rodriguez Antongiorgi: May I have this marked in identification?

[104] The Clerk: This is Identification 23 for the Government.

[The supporting documents in the sale of furniture by Casa Pacheco were marked as Identification 23 for the Government.]

Mr. Romero: We object on the grounds it is irrelevant and immaterial, and the last document in the back with reference to some furniture he bought, we have no evidence whatsoever that he paid any money from the union.

Mr. Rodriguez Antongiorgi: I am just limiting this to the furniture bought and the balance paid by this check in evidence. I withdraw the other.

The Court: Objection overruled. The documents are admitted and ordered marked Exhibit 23 for the Government.

[The documents in question, having been previously marked for identification, were admitted in evidence and marked Exhibit 23 for the Government.]

Mr. Perez Marchand: No questions to Mrs. Pacheco.

(The witness was excused.)

The Court: Of course, Mr. Rodriguez, these are all admitted subject to being completed with a translation to the English language.

* * *

[105] J. A. LIND

a witness called by and on behalf of the Government, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiori:

Q. Please state your full name? A. J. A. Lind.

Q. What is your occupation or business? A. Merchant.

Q. Where? A. In Ponce.

Q. Do you know the defendant Wadelmiro Arroyo? A. Yes, sir.

Q. Did you have any dealings with him? Did you sell him anything? A. Yes, sir.

Q. Showing the witness Identification 18 for the Government, does this identification mean anything to you? Will you please explain it if you had anything to do with it? A. This was a check issued by the Union de Trabajadores de Factoria, Refineria y Ramas Anexas in payment of equipment we sold to that union.

Q. What did you sell? A. Well, we sell different kinds of equipment. We sold [106] to the union two invoices dated April 8, 1953, one card file $6.50, 2000 index cards 3 x 5 in the amount of $4.00, a swivel chair $82.50, making a total of $93.00, and another invoice dated March 4, 1953, for another card file size 5 x 8 in the amount of $8.00, and one double deck desk tray in the amount of $5.50 making in the invoice a total of $107.00.

Mr. Rodriguez Antongiorgi: That is all. The purpose is that we contend that even if there is some furniture that could be used for the union, still it is a violation of the welfare fund because it has a specific purpose which is medical payments. That's why we offer this in evidence.

Mr. Perez Marchand: May we question the witness before we state our reasons?

The Court: Yes.

Cross Examination on the Documents

By Mr. Perez Marchand:

X-Q. Mr. Lind, do you know whether this office equipment that you sold to the Union de Trabajadores de Factoria, Refineria y Ramas Anexas, Local 1781, was taken out of your establishment and sent to any particular place? A. There was an invoice that we did make delivery of that invoice, but the other invoice we did not make delivery because it was taken right in our store.

X-Q. Do you know whether there is a welfare fund office [107] in Ponce?

Mr. Rodriguez Antongiorgi: We object to that, Your Honor. Whether there is a welfare fund office.

Mr. Perez Marchand: A welfare fund office, an office for the welfare fund in Ponce? Have you heard of the "fondo de beneficio" of the union?

A. No, sir.

X-Q. You only know the union as such? A. Yes, sir.

X-Q. You don't know if this equipment was bought for the office of the welfare fund of the union, or the union itself? A. I don't know.

X-Q. You don't know? We object to this evidence because it is irrelevant, immaterial and incompetent, and has no bearing on the question before the Court and is absolutely a deviation from the charge.

Mr. Rodriguez Antongiorgi: I might add to what I said that the Government has established that the account from the Banco de Ponce was established with the nine thousand dollars traced to the fifteen thousand dollars, and then the union funds were mingled with these funds so we don't have to establish whether it was for the union or not for the union. We are trying to establish an illegal management of the fund.

Mr. Romero: Your Honor, Mr. Rodriguez just said he is [108] trying to establish illegal management of the fund.

Mr. Rodriguez Antongiorgi: And illegal use of the fund. I have said the theory of the Government many times already, and Your Honor knows it. I don't see any need for this.

The Court: Well, under Section 186, these funds can not be used for that purpose. And as this evidence tends to show a purpose not permitted by the Act . . .

Mr. Romero: Begging your pardon, we are going to read Section 186 again. It says, first of all, Section (a), "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

The first offense is committed by the employer.

The Court: It isn't covered here.

Mr. Romero: No, it hasn't been brought, and the statute of limitations has run against the employer. Then section (b) says, "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

All right, Your Honor, then Section (c), "The provisions of this section shall not be applicable," and then states the exceptions.

[109] In the case of Mejias v. Waterman, Your Honor decided that Section (c) is a defense of the representative, that he can defend himself by establishing this, but the United States Attorney is trying to negative the defense pertinent to the defendant, to introduce evidence which does not prove whether the defendant received any money or other thing of value. He is trying to prove that defendant had a provision where he could draw from by his signature, and that he used that fund for his own benefit. That is not under the statute nor under the indictment, and that is why

we have been, and continue to object to the evidence as being irrelevant and immaterial to the case.

The Court: I have decided that question many times today. I read the statute differently from the way you read it, and of course the exception is for a specific purpose. If it is shown that the money was not received for that purpose, and was used by the defendant for his own personal use or for other uses not authorized, by him, that's money received in violation of the statute. Objection overruled, and the document is admitted and ordered marked Exhibit 18 for the Government.

[The document in question, having been previously identified, was admitttd in evidence and marked Exhibit 18 for the Government.]

[110] The Court: Any cross examination of the witness?

Mr. Perez Marchand: No, Your Honor.

Mr. Rodriguez Antongiorgi: No more questions.

(The witness was excused.)

CARLOS SERBIA

a witness called by and on behalf of the Government, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name? A. Carlos Serbia.

Q. What is your occupataion or position? A. Cashier of Pedro Piza, Inc.

Q. What is that? A. An automobile dealer.

Q. Did you bring some records from your office that were subpoenaed? A. Yes, a conditional sales contract and a receipt.

Q. Will you please describe this document that you brought with you? May I have it marked first, please?

[Conditional sales contract for an automobile was marked Identification 24 for the Government.]

The Clerk: This is Identification 24 for the Government.

Q. Will you please describe this document, and the other [111] supporting paper? A. A conditional sales contract.

Q. For what, and to whom? A. For an automobile sold to Mr. Wadelmiro Arroyo on March 25, 1953, by our agent in Ponce.

Q. The supporting document? How was that paid for? A. The initial payment was made in cash, $400 covered by a National City check.

Q. Is there any identification of that check that appears on the document? A. Yes, Union de Trabajadores de Factoria, Refineria, y Ramas Anexas.

Q. That was a check against the National City Bank made out to cash, as appears from that voucher? A. No, it seems to be made in favor of Wadelmiro Arroyo, and then endorsed to Pedro Piza, Inc.

Q. And your notation says—check? A. Union de Trabajadores de Factoria, Refineria, y Ramas Anexas, on the National City Bank.

Q. What date was that? A. The receipt was made March 20, 1953.

Q. I offer this in evidence, Your Honor.

Mr. Perez Marchand: We respectfully object to this evidence as wholly irrelevant, immaterial and incompetent to the case at bar. We consider it a complete deviation and [112] fatal variance in the light of the charge. We consider it also a most prejudicial form of impressing the jury with evidence that is not pertinent to the case, although we recognize that this would be a splendid piece of evidence in an embezzlement case, over which this Court has no jurisdiction.

Mr. Rodriguez Antongiorgi: I offer this evidence, and connecting it with the testimony of the employee from the

National City Bank, and the ledger in which he described it was a check for $400 on March 20, which corresponds directly with this voucher which appears with a notation saying that $400 were paid on a check from Union de Trabajadores de Factoria, Refineria y Ramas Anexas, Local 1781. I will ask two more questions to complete the offer.

Q. Is that part of the records of your company? A. Yes.

Mr. Herrera: Objection.

Mr. Rodriguez Antongiorgi: What's the objection?

Mr. Herrera: He is begging the answer from the witness. You are giving the witness all the information you want him to give you, that's all.

Mr. Rodriguez Antongiorgi: That's the only way you can answer the question. All the questions with yes or no answers are not leading.

Mr. Herrera: You are giving the information you want from the witness, and he is answering yes or no.

[113] Mr. Rodriguez Antongiorgi: He already testified to that, anyway.

The Court: These are the records. Objection overruled. Any more questions?

Q. Well, I have to ask the question the same way. Is it part of the business of Pedro Piza, Inc., to keep this type of records?

Mr. Herrera: Objection on the same ground.

The Court: Objection overruled. Not all the questions answered by yes or no are leading.

Mr. Herrera: But he is asking the questions, and has been asking them that way, the last two or three hours, Your Honor.

The Court: Objection overruled, and it is admitted and marked Exhibit 24 for the Government.

[The documents, having been previously identified, were admitted in evidence and marked Exhibit 24 for the Government.]

Mr. Rodriguez Antongiorgi: No more questions from this witness.

The Court: Any cross examination of the witness?

Mr. Perez Marchand: Nothing. He sells Pontiacs. They are good cars.

A. Thank you.

(The witness was excused.)

[114] JOAQUIN EUGENIO CANDAL

a witness called by and on behalf of the Government, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name? A. Joaquin Eugenio Candal.

Q. What is your occupation, Mr. Candal? A. Merchant.

Q. What do you sell? A. Office equipment.

Q. Do you know the defendant in this case, Wadelmiro Arroyo? A. Yes, sir.

Q. Do you see him in this room? Please point him out? A. Yes, sir; there.

Q. Did you have any business dealings with him? Did you make any sales to him at any time? A. Yes, office equipment. I have had dealings with him in office equipment.

Q. Please describe what you sold him, and how he paid for that? A. Well, I have here an invoice number 5231, for 2 junior executive desks, 1 typewriter stand, 2 side chairs, and 1 [115] secretarial chair, for the amount of $168.00.

Q. How was that paid? Showing the witness Identification 20 for the Government, please state if you know what that is? A. Yes, this was the payment of that invoice, as of invoice number 5231, of April 8, 1953.

Mr. Rodriguez Antongiorgi: I offer this in evidence and I have no more questions from this witness.

Mr. Romero: We object the same as before. I would like to look at one of the exhibits that has the ledger of the Banco de Ponce. It does not say the name. No, this is the National City Bank. All these have been Banco de Ponce.

The Court: This is the National City Bank ledger. The Banco de Ponce has several sheets, I believe.

Mr. Romero: This is Banco de Ponce. I wish to call the Court's attention to the fact that in this ledger sheet we do object to its admission and we don't think it is relevant, but just for the purpose of what the District Attorney is trying to introduce in this case, the evidence which he submits, we want to call the Court's attention to the fact that there has been quite a few deposits made in this ledger, and the total amount of all the checks presented here do not add up to the total amount of the deposits since the establishment of that account under the general name of the union.

Mr. Rodriguez Antongiorgi: Yes, I will answer that. I would like to answer that's precisely why we proved that [116] the funds were commingled in violation of the agreement. It is impossible to determine after the commingling of the funds with the union and the welfare fund, to determine where each check was traced to. The defendant is the only one who knows that.

The Court: Anyway, it appears here that the original deposit of that Nataional City Bank manager's check in the sum of $9,813.89 was made to open this account on March 26, 1953. There are no further deposits on that account until April 1,—no, April 14. This check was issued April 9th, and appears here—yes, April 9th, and appears here entered in that account on April 9th, $387.75. So it was withdrawn at least from the original fund, which was brought from the National City Bank.

Mr. Romero: The $9,000 was drawn from an account

in the Banco de Ponce, and that account was expanded according to that ledger which we consider inadmissible, but also we want to object to the admissibility of the check on the grounds that we have heretofore mentioned.

The Court: Objection overruled, and the document is admitted and marked Exhibit 20 for the Government.

[The document in question, having been previously identified, was admitted in evidence and marked Exhibit 20 for the Government.]

The Court: Any cross examination of the witness?

Mr. Perez Marchand: A few questions, Your Honor.

[117] *Cross Examination*

By Mr. Perez Marchand:

X-Q. If it may please the Court, are you well acquainted with the defendant, Wadelmiro Arroyo? A. Yes, sir.

X-Q. Do you know where the office of Union de Trabajadores de Factoria, Refineria y Ramas Anexas, Local 1781, of which he is president, is located? A. Yes, Sir, in Estrella Street, corner of Grandstand Street, Tizol Street.

X-Q. Have you also heard or do you have any knowledge of the "Fonda de beneficencia" or welfare fund? A. No.

X-Q. When you sold that equipment to the Union de Trabajadores de Factoria, Refineria, y Ramas Anexas, Local 1781 as shown by your invoice and checks, were you informed of the destination of this furniture or equipment? A. Yes, sir. This was for the union, for the office of the union.

Mr. Perez Marchand: Thank you. No more questions.

(The witness was excused.)

ORLANDO J. ANTONSANTI,

a witness called by and on behalf of the Government, after having been first duly sworn was examined and testified as follows:

[118] *Direct Examination*

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name and occupation, for the record? A. Orlando J. Antonsanti.

Q. Your occupation, Mr. Antonsanti? A. I am an attorney at law.

Q. Are you one of the attorneys, or the attorney for the Serralles Industries, including Central Mercedita and Puerto Rican American Sugar Refinery, Inc.? A. I am.

Q. Did you take part, for these companies, in the negotiations of contracts and collective bargaining agreements? A. Usually. I usually do.

Q. Did you take part in such capacity in the negotiation and drawing up of the collective bargaining agreement of 1953 with the union, "Union de Trabajadores de Factoria, Refineria, y Ramas Anexas"? A. 1953?

Q. Yes, the one we have to do with here, of February 21, 1953? A. I took part in the preliminary conversation and the preliminary bargaining, and I drafted what I believe was the final agreement.

Q. May I have Ehibits 2 and 3 for the Government? Will [119] you please look at this Exhibit 3 and tell me if that is the document you are referring to? A. I have looked at it. What's your question?

Q. Whether that is the agreement you just testified that you took part in the negotiating and drafting? A. It looks like it, although it isn't the draft I made. It may have been copied. It looks like it, from the general mechanics of it. I haven't read it all.

Q. That's all right. Now, you brought with you at the request of this Court this document which apparently was in your files? I had subpoenaed it from Mr. Goyco. Will you explain why that document was in your files, and what it represents? A. This was a part of the agreement. It was supposed to clarify a provision in the agreement where,

when the welfare fund is created, it stated that it shall be jointly managed by representatives of the union and representatives of the employer, and I prepared this document I have in my hand to be executed at the same time the agreement was executed.

Q. When you prepare documents like that, and keep copies of them, is it the usual practice of your clients to have them executed? Carried out? A. Usually. If another had been executed, I would say it would be in my file, but this is the only one I found.

[120] Q. And it is part of your procedure in your office to keep a regular file for your clients? A. Yes, especially of any documents I prepare, I usually keep a copy.

Mr. Rodriguez Antongiorgi: I offer it in evidence.

A. I also note in the document in my own handwriting in pencil, this refers to the collective bargaining agreement Mercedita and Refineria for 1953-54-55.

Q. Is that what that refers to? A. That is the agreement in force during those years.

Mr. Rodriguez Antongiorgi: That is all with the witness. I offer it in evidence.

Cross Examination

By Mr. Perez Marchand:

X-Q. If I may please the Court, Mr. Antonsanti, you said that you prepared the draft for the collective bargaining agreement which is now before the Court in Exhibit 3. But you were not present at the moment when the $15,000.00 referred to in paragraph (a) of Article (6) of the agreement was handed over, or delivered to the representatives, or representative, of the union?

Mr. Rodriguez Antongiorgi: We object, Your Honor.

The Court: That has not been the subject of direct examination.

Mr. Rodriguez Antongiorgi: The witness was brought only because the copy of the letter was in his files.

[121] The Court: The witness was brought to indentify the copy of the letter.

Mr. Romero: Mr. Rodriguez asked if he drafted the collective bargaining agreement.

The Court: And he said he drafted it, but was not present when it was signed. So, if he wasn't present when it was signed, then—

Mr. Perez Marchand: I may have taken the long way home, Your Honor, when I asked Mr. Antonsanti, because what I was really driving at was that on the basis of what he had said, he might be able to answer this pertinent question.

X-Q. Do you remember, or know, the date on which this agreement was signed, Mr. Antonsanti?

Mr. Rodriguez Antongiorgi: Objection to that also. The agreement is in evidence, Your Honor.

Mr. Perez Marchand: He must know that, and he can answer that. I have a question for him which has a great deal of weight on that question.

The Court: How can he remember the date when it was signed? He wasn't present. That is asking for hearsay.

Mr. Perez Marchand: He has a copy of a document he prepared himself. He could tell us, yes, if was signed on such a date.

The Court: That appears on the document itself.

X-Q. Referring the witness to Exhibit 3 for the Government, [122] will you kindly tell me, Mr. Antonsanti, what date this agreement bears? A. The agreement bears the date of 21 February 1953.

X-Q. Will you kindly look at Article (6), relative to the Welfare Fund, and read the second paragraph? Assuming that you have read the second paragraph, the fund established by this agreement was to be administered by a

committee, to be appointed in the future by the parties to the agreement? A. That is what that paragraph says.

X-Q. So that means that according to this agreement, some time after the 21st of February 1953, the parties should come together and appoint a committee? A. That is assuming that it was signed on February 21, 1953.

X-Q. But it appears to have been signed on February 21st? A. It bears that date.

X-Q. Yes, according to this letter which bears the date of February 20th? A. That is correct. This letter was prepared by me on that date. The date that it bears.

X-Q. And the addressee on recipient, Mr. Arroyo, is informed on the 20th of February that the Welfare Fund has already been established? Isn't that so? A. Well, I would say, as I said before, that I prepared this letter on the 20th of February. Whether or not it was mailed to him on that date, I don't know.

[123] X-Q. But there is evidence that on the 20th of February this agreement had not been signed? A. As far as I know, it was not signed on the 20th of February. That's correct.

X-Q. Yet, Mr. Arroyo is informed by that letter, which ante-dates the agreement, that he must abide by the conditions of the agreement that has already been signed?

Mr. Rodriguez Antongiorgi: I object, Your Honor. This is drawing for a conclusion.

The Court: Yes, you are asking for a conclusion. That would be argument for the Court. You are arguing with the witness, even though he is an attorney.

Mr. Rodriguez Antongiorgi: Yes, it is part of that same transaction. The agreement was signed the 21st, the letter on the 20th. Evidently he is trying to have Mr. Antonsanti explain something.

Mr. Perez Marchand: I am not blaming Mr. Antonsanti. I am simply trying to discuss and discredit this evidence

which the Government is using against the defendant. Mr. Antonsanti, as a conscientious and competent lawyer, prepared all the papers. He passes them over to his clients, and they act accordingly, but later on this document has been made use of, or has not been made use of, and the Government is using it against the defendant regardless of the disparagement in dates and the obvious fact that it not only bears a date—

The Court: The Government is not using it yet. The [124] Government is offering it, and you may argue to the Court that that is the situation.

Mr. Rodriguez Antongiorgi: I am ready to argue the admissibility of that.

Mr. Perez Marchand: I beg to say with due respect to my friend and brother attorney, the Government has been wielding that as a blackjack for the last five hours.

Mr. Rodriguez Antongiorgi: It is no blackjack. It is a simple letter in evidence. We should try to avoid arguments to the jury, because that is what my colleague is trying to do. I submit that's not proper.

The Court: Any more questions to the witness?

Mr. Rodriguez Antongiorgi: I have one question to Mr. Antonsanti.

The Court: I have not yet ruled on the exhibit.

Redirect Examination

By Mr. Rodriguez Antongiorgi:

Q. Isn't it a fact that this letter is a part of the transaction covered by that collective bargaining agreement, whether it is dated the 20th or 21st? A. Well, it was intended to be.

Q. I submit the question, Your Honor.

The Court: I must sustain the objection to this document anyway; not because of the discrepancy in dates, but there has been no evidence whatsoever—let me have the

letter [125] —that this letter was ever signed or countersigned or approved by Mr. Arroyo as required. Second, that the original thereof was ever mailed, because Mr. Goyco was not the one who prepared that letter, or had anything to do with the sending of the letter. He didn't testify that the original of the letter was mailed.

Mr. Rodriguez Antongiorgi: May I ask another question of Mr. Antonsanti? Maybe he knows.

The Court: Of course, if we had a witness that would say that the original was mailed to Mr. Arroyo in the regular course of the mails, that this is a carbon copy of the letter kept in the files of the company, irrespective of whether Mr. Arroyo returned the copy duly signed or not, it would be admissible to show that the company sent the letter, but I have no evidence as to that, and the attorney here testified he prepared this, he assumed it would be signed—but again he can not vouch that it was signed or the date changed, or the form changed, or the original delivered, so I can not accept this.

Mr. Rodriguez Antongiorgi: As Your Honor knows, in criminal cases the Government can not ask anything from a defendant, with respect to a letter addressed to the defendant. All we can do is produce copies from people who in the regular course of business mailed copies to the defendant. That's all we can do. Nothing more.

[126] The Court: But there is no evidence of anybody who mailed the original.

Mr. Rodriguez Antongiorgi: Well, if I may ask one more question, I will be satisfied.

The Court: All right.

Q. Can you furnish any information whether it was mailed or whether it was the practice to mail a letter like this? Do you have anything from your files to show that? Maybe if you examined your file? A. Let me attempt to explain. As it shows from the document, two persons are

mentioned therein. One is Mr. Arroyo, as being the employee representative. I know from my own personal knowledge during the previous discussion and bargaining the question arose as to who would represent the employees on the bargaining committee, and Mr. Arroyo said, "I", as he has always represented the union as far as my knowledge goes; he has represented the employees in these negotiations. And Pedro G. Goyco was given to me as the name to be included by the employer, my client.

Mr. Rodriguez Antongiorgi: With this testimony, and Mr. Goyco's testimony, I withdraw this. I don't need it.

[Identification 6 for the Government, having been previously withdrawn, then reoffered in evidence, was again withdrawn.]

Mr. Perez Marchand: May I ask a question?

[127] Mr. Rodriguez Antongiorgi: If you want it, you may have it.

Recross Examination

By Mr. Perez Marchand:

X-Q. Since this letter is known to you, Mr. Antonsanti, and since its contents deal exclusively with the establishment of the trust fund, how come—

The Court: The letter is not in evidence.

Mr. Rodriguez Antongiorgi: I withdrew it.

The Court: You can not make reference to any document which is not in evidence.

Mr. Perez Marchand: But the witness, at the initiative of the Government, has been mentioning the names of the people in this letter, and I have a right to cross examine him as to these particular people.

The Court: No. You can cross examine him as to the fact, not the letter, that if he remembers that he asked Mr. Arroyo who said he was going to be the representative of

the employees in the trust fund, and he knew that Mr. Goyco was designated as the employer's representative.

Mr. Perez Marchand: Begging the Court's leniency. My understanding has been that my brother attorney has mentioned Arroyo as the man who represented the union in the bargaining agreement, not the man who represented the union in the trust fund.

[128] Mr. Rodriguez Antongiorgi: No, no.

Mr. Perez Marchand: I appeal to the record.

The Court: No, no.

(Part of the testimony on direct examination was read back by the Reporter.)

The Court: You may go ahead, because what he said was "bargaining committee", not the welfare fund.

Mr. Rodriguez Antongiorgi: Let me ask one question, then, because of that. What do you mean by "bargaining committee" when you said Mr. Arroyo was to represent the employees and Mr. Goyco the employer? In what?

A. I perhaps used that in both senses. Mr. Arroyo, since 1949, has represented the employees, or has been connected with the employees at least for the past five or six years, has dealt as the representative of the Union with Puerto Rican American and Central Mercedita. I also meant and mean that Mr. Arroyo, as far as my knowledge goes, has been the Union representative on the Welfare Committee. He, and sometimes not alone, and some years I believe he and some other member of his Board of Directors of his union, and two representatives of the employer, were on the Welfare Plan. I understood from negotiations prior to February 20th, 1953, that the parties desired to have fewer representatives on this Welfare Committee. Apparently the objection was that the more people, the more difficult it was to arrive [129] at grievances, the solution of grievances, and that Mr. Arroyo

preferred that the company select one man and he would select himself.

Mr. Rodriguez Antongiorgi: When you refer to Welfare Committee, you mean the committee established under Article (6) of the collective bargaining agreement, Exhibit 3?

A. That's right.

Recross Examination Continued

By Mr. Perez Marchand:

X-Q. If it may please the Court, now Mr. Antonsanti, from what you know can you affirm that Mr. Arroyo was directly and specifically informed by your client, Central Mercedita and Puerto Rican American Sugar Refinery, Inc., of the manner in which the Welfare Fund Managing Committee should be formed? A. That was a little long. May I have it repeated? I lost the straight of it.

(The question was read back by the Reporter.)

A. Well, I know some things—and others, not. The way the question is phrased, counsel, I know some things, and others not. Would you please rephrase it?

X-Q. Yes, I will break it up for you. Could you swear that the letter to which reference has been made here—

Mr. Rodriguez Antongiorgi: I object to the reference to the letter. It has been withdrawn.

The Court: Yes, it has been withdrawn.

[130] X-Q. Could you swear that the managing committee was duly established as per Article (6) of the collective bargaining agreement? A. It all depends on what you mean by "established". If you mean designated, the answer is yes.

X-Q. Well, according to Article (6)? The statement is here made with a view to the future. That after this agreement is signed, the parties will get together and designate

their respective representatives? A. Your question is, did they get together and designate—

X-Q. Do you know, for a fact, if they ever got together and designated their representatives and trustees, according to the law of trusts?

Mr. Rodriguez Antongiorgi: We are not dealing with the law of trusts here.

Mr. Perez Marchand: There is a trust, and a Welfare Fund is a trust.

Mr. Rodriguez Antongiorgi: This is under the Taft-Hartley Act, not a trust.

Mr. Perez Marchand: It is a trust, and you can not establish a trust in the form of what the Russians may be thinking.

Mr. Rodriguez Antongiorgi: This was not the subject of direct examination, but if counsel wishes, and Mr. Antonsanti [131] is a witness for the defense—

Mr. Perez Marchand: Who said he is a witness for the defense? You sat him there.

The Court: The objection is overruled. You answer the question.

A. I am still trying to find out whether he means "designated" or actually functioned as such.

The Court: It is " designated".

A. If the question is designated, I would say, yes.

X-Q. And if the question is "established", you would say no? A. I don't know.

X-Q. That's enough. You don't know.

• • •

[135] Mr. Rodriguez Antongiorgi: This is Exhibit 21 for the Government, a letter from Central Mercedita, Inc. It says:

"CENTRAL MERCEDITA, INC.
Mercedita, Puerto Rico

"Central Mercedita May 4, 1953

Cable Address:
Mercedita - Ponce
Codes Used BENTLEY
A.B.C. 5th Edition
Liebers

"Banco de Ponce,
Ponce, P. R.

"Dear Sirs:

[136]. "Re: Benefit Fund Account. Union of Factory Works and Refinery and Related Branches to the Sugar Industry, Local 1781, ILA-Ponce

"We have been advised that on March 26, 1953 the Union of Factory Workers and Refinery and Related Branches to the Sugar Industry affiliated to the ILA deposited a check in the amount of $9,813.89, from the National City Bank, wherein the amount of $15,000.00 had been previously deposited in checks issued by us in order to open a Benefit Fund, according to the provisions of Article 6 of the outstanding Bargaining Agreement, signed by us with the labor union above mentioned.

"Pursuant to Article #6, the "Benefit Fund will be administered by a Committee which shall be appointed by mutual agreement between the Union and the Employer. The Committee, thus appointed, will present a written account every month to the employer of the disbursements made to the account of said Fund."

"In view of the fact that the said Labor Union has not complied with this provision, we hereby request of you to lend us photosfatic copy of all the checks that have been issued against the said Fund, and the

monthly statement of account as long as said account is kept open in that institution.

"I thank you in advance, and remain.

Very truly yours,

CENTRAL MERCEDITA, INC.

[137] (s) J. M. GILES

Administrator

PORTO RICAN AMERICAN SUGAR REFINERY, INC.

(s) J. M. GILES

Mgr."

Now, I will read from Exhibit 22 for the Government, which is the answer to this letter, from the bank.

"Ponce, P. R.

May 13, 1953

"Central Mercedita, Inc.

Mercedita, P. R.

"*Atts Mr. J. M. Giles, Administrator*

"Dear Sirs.

In accordance with the telephone conversation had this morning by our attorney, Francisco Parra Toro, Esquire, with your Administrator, Mr. J. M. Giles, we hereby reply to your letter of the 4th instant, which was received yesterday, with reference to Benefit Fund, Union of Factory Workers and Refinery and Related Branches to the Sugar Industry, Local #1781, I.L.A., Ponce, and hereby confirm that the checking account which was established in this bank on March 26, 1953, was in the name of the Union of Factory Workers and Refinery and Related Branches to the Sugar Industry, by a National City Bank Manager's Check, and that copies of the regulations of said Union, as well as a certificate from the secretary thereof, empowering its President, Mr. Wadelmiro Arroyo, to sign by himself the checks issued against said checking account.

[138] "Therefore, in our books and and records there does not appear any account in the name of the Benefit Fund to which you refer. You will understand that our duty is to cooperate as far as possible with that firm, and we would like to do so, giving you the information which you asked for in your said communication. Nevertheless, in order for this bank to be able to give you information regarding a checking account of the Union of Factory Workers and Refinery and Related Branches to the Sugar Industry, we need the written authorization from the Chairman of that Union, and, as you know, at the end of each month this bank returns to its clients all the paid checks accompanied by a statement of account. Therefore, the checks that the Chairman of the Union issued against said account and that were paid by us during the months of March and April, in due course were returned duly cancelled to the Chairman of said Union, and those which were paid during the current month of May, as usual, will be returned duly cancelled the last day of the month, and so on in the future.

"We trust that you will understand the reasons which forbid us, against our will, to furnish us" it must be "you".

Mr. Ramirez: I didn't make the translation.

Mr. Rodriguez Antongiorgi: It must be "you", it says, "furnish us". I am sorry, Mr. Ramirez. "—to furnish us the information requested by you, and remain

Very truly yours,
A. F. Armstrong,
President."

[139] Now, I would like to read the letter to the National City Bank, Exhibit 8 for the Government:

"Ponce, Puerto Rico
March 2, 1953

"National City Bank
Ponce, Puerto Rico
"Gentlemen:

"This will notify you that pursuant to the Collective Bargaining Agreement entered into and signed between the undersigned Union and the Porto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., and to its Article 6, this Union Board of Directors authorized our president, Mr. Wadelmiro Arroyo, at a meeting held on February 22d of this year at their office of No. 8 Castillo St., to draw up to the amount of $15,000.00 against that Bank and our account of the Welfare Fund, for each of the years 1953, 1954, 1955 in which the contract with said firms terminates.

"This agreement is endorsed by the signatures of the Directors.

Very truly yours,

"(s) JUAN GALY RIVERA, *Vice-President*
(s) LUIS SILVAGNOLI
LUIS SILVAGNOLI, *Secretary*
(s) RAMON RIOS, *Treasury*
(s) ANTONIO FIGUEROA, *Marshal*
(s) DIONISIO RIVERA, (*Vowel*) *sic.*

(s) WADELMIRO ARROYO
WADELMIRO ARROYO
President"

140] Although in the original there is only one signature. Two signatures appear, Wadelmiro Arroyo's and another signature. And now I would like to call Mr. Silvagnoli.

LUIS SILVAGNOLI

a witness called by and on behalf of the United States, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rodriguez Antongiorgi:

Q. Please state your full name? A. Luis Silvagnoli.

Q. Where are you from, Mr. Silvagnoli? A. I am from Ponce.

Q. What's your occupation? A. I don't have any occupation.

Q. During the years 1952 and part of 1953, were you a member of any labor union? A. Yes, sir.

Q. Which one? A. Of the 1781 ILA.

Q. Who was president of that Union? A. Mr. Wadelmiro Arroyo.

Q. Did you hold any office in the Board of that Union? A. Yes, sir.

Q. What was the office that you held? [141] A. Secretary.

Q. You were the secretary of that union? Showing the witness Exhibits 4 and 5 for the Government, will you please take a look at these checks, each one in the sum of $7,500, and the endorsement on them, and see if you recognize your signature there? A. These were two checks that the Serralles firm gave to us to be used in the welfare plan for the workers.

Q. As secretary of the union, did you endorse those checks? A. Yes, sir.

Q. The two of them? A. Yes, sir, both of them.

Q. Now, showing the witness Exhibit 8 for the Government, which is a letter addressed to the National City Bank, allegedly from the union authorizing the defendant to sign the checks on that fund—will you please examine that

document and tell me if you signed that resolution? First, you tell me what name appears there? What does it say there? A. Here is the name of Wadelmiro Arroyo, and the name of Luis Silvagnoli.

Q. Is that your signature? A. That is not my signature.

Q. You say that you never signed that letter? A. I did not sign that.

[142] Q. Mr. Silvagnoli, did you testify before the grand jury of this court about a year or so ago? A. Yes, sir.

Q. Did you see this document before the grand jury, when it was shown to you? A. Yes, sir.

Q. When did you see this document for the first time? A. I saw that document in the presence of the grand jury.

Q. Now, Mr. Silvagnoli, it appears from this document that evidently something is missing there? A. Yes, sir, it appears to have been mutilated.

Q. Was that the way the document was shown to you, before the grand jury? A. Yes, sir. Exactly like that.

Mr. Rodriguez Antongiorgi: That is all

The Court: Cross examine.

Mr. Rodriguez Antongiorgi: May I be permitted, Your Honor, to ask one more question before cross examination of the witness?

The Court: Counsel for the Government wants to ask one more question of the witness.

Mr. Perez Marchand: That will be all right. Very well.

Q. Now, Mr. Silvagnoli, in this exhibit for the Government, in this document, reference is made to an alleged meeting of the union, held on February 22, 1952. As secretary [143] at that time of that union, do you know if such a meeting was held? A. That meeting was not held.

Mr. Rodriguez Antongiorgi: That is all.

Mr. Perez Marchand: If I may please the Court, before proceeding with the cross examination of witness Silvagnoli, I would like to ask my brother attorney for the Government

if he will stipulate that this document, Identification 8 and Exhibit 8, was not in the possession of the defendant? Has not been?

Mr. Rodriguez Antongiorgi: That document was impounded, subpoenaed, by the grand jury of this court.

Mr. Perez Marchand: From whom? From the defendant?

Mr. Rodriguez Antongiorgi: From the records of the union, I believe. Because I believe there was a subpoena, but it appears from the record.

Mr. Perez Marchand: Wasn't that impounded from the bank?

Mr. Rodriguez Antongiorgi: From the National City Bank.

Mr. Perez Marchand: In other words, this document has never been in the hands of the defendant?

Mr. Rodriguez Antongiorgi: Well, I don't know. The testimony before this Court was that it was submitted to the bank when they opened the account. It is up to the Court to draw any inferences, and the jury. The testimony is, when [144] the commerical account was opened in the National City Bank this document was submitted in order that he would be permitted to draw checks against the account.

Mr. Perez Marchand: In order to prevent unnecessary questions, I want to know if it is known to the District Attorney if this document was delivered to the bank in the mutilated form in which it is now, or was it ever brought before the grand jury?

Mr. Rodriguez Antongiorgi: I don't know. When this document was brought to the grand jury room, it was in that shape.

Mr. Perez Marchand: Already mutilated? Thank you.

Mr. Rodriguez Antongiorgi: And that's what the witness just testified.

The Court: I believe the employee of the bank who brought that could not explain that. He was asked by Mr. Romero Barcelo and couldn't explain that.

Mr. Perez Marchand: What I want to do is save the defendant from any charge of mutilation, because the witness says as he sees it now it is mutilated.

The Court: There is no charge of mutilation. There is only the explanation that the document was shown to the grand jury exactly as it is now.

Mr. Rodriguez Antongiorgi: I believe we are maybe using the wrong word. The lower part of the letter is missing, but [145] there is no mutilation of the document as to now. I believe "mutilated" means obliterated. The lower part of the letter, 1/3 or 1/4 of the paper, has been cut off, as we look at it now.

Mr. Perez Marchand: There are implications, and I insist the document is mutilated.

Mr. Rodriguez Antongiorgi: I won't argue about that.

Mr. Perez Marchand: I would be willing to submit to Mr. Webster's authority as to what mutilation means. It has been cut. It isn't complete. The bottom shows that there were other signatures, and maybe a legend or written statement of explanation which has not been brought before the grand jury.

The Court: The document is in evidence already. It would have been proper to object to the document, but it is in evidence already.

Mr. Rodriguez Antongiorgi: And as far as Silvagnoli's testimony, the signature isn't mutilated. Simply that isn't his signature. That isn't mutilated, and that appears from the document as it is.

Cross Examination

By Mr. Perez Marchand:

X-Q. Mr. Silvagnoli, do you generally sign your name with a fountain pen, an ordinary pen, any kind of a pen? A. I use a pen that I always have with me, usually.

X-Q. Is that a fountain pen? What they call now— [146] A. Fountain pen.

X-Q. What color of ink do you generally use in your pen? A. I use blue ink.

X-Q. You use blue ink? A. Yes, sir.

X-Q. Have you used black ink too? A. No.

The Court: He says "never".

X-Q. I understand you to say that you usually write in blue ink, never in black ink?

Mr. Rodriguez Antongiorgi: He didn't say that. I don't know that he said he never used black.

The Court: He said, "never."

A. Yes, sir.

X-Q. In this document, which you have just examined from the hands of the District Attorney, there is signed, "Luis Silvagnoli" in what color or ink? A. In green ink.

X-Q. You have never used that ink? A. Never.

X-Q. So, there are two colors of ink that you have never used, green and black? A. Yes, sir.

X-Q. Now, you have just stated that this signature is not your signature? Meaning the signature to Exhibit 8? [147] A. It is not mine.

X-Q. I am showing you now Exhibit 3 for the Government, and asking you to tell me if this signature there, Luis Silvagnoli, is yours, or is it falsified? A. This signature is mine.

X-Q. Is it in green ink or in black ink? A. It is in black ink.

X-Q. So that is once that you signed in black ink? A. Yes, sir, because the pen was not mine.

X-Q. And that is your signature to the working agreement, or collective bargaining agreement? A. Yes, that is my signature.

X-Q. Now, showing you the $7,500 check of Central Mercedita, is that signature in the endorsement of this check your signature? A. Yes, sir.

X-Q. And that is in black ink? A. It is in green ink.

X-Q. Oh, green ink? That's the ink you never use? A. Because we use that ink regularly in the office. A. So that's another instance in which you used green ink, and not black? Now, asking you to examine the check for $7,500 from Puerto Rican American Sugar Refinery, Inc., which you examined before, is this signature there your signature, in the endorsement of the check? [148] A. Yes, sir.

X-Q. In black ink? A. In green ink.

X-Q. In green ink. So that's another instance in which you used green ink? A. Yes, because that was done in the office.

X-Q. When you have affirmed that the signature "Luis Silvagnoli" in green ink at the bottom of this mutilated letter to the National City Bank is not your signature? A. It is not my signature.

X-Q. What is the basis for this affirmation? A. My affirmation is on the basis that paper is mutilated and that writing when the endorsement was made at the National City Bank did not have that writing there.

X-Q. Passing the exhibit to you, for example, will you be kind enough to explain first how do you know this document did not bear this signature when it was delivered to the National City Bank? A. I saw that paper for the first time here.

X-Q. Looking at the document itself, will you kindly tell the jury and the Court what is there in the document that induces you or leads you to affirm that is not your signature?

Mr. Rodriguez Antongiorgi: I object. The only way a person can say a signature isn't his is looking at it, and [149] of his own knowledge he knows, and to his own knowledge it is not his.

The Court: Yes. He already testified that it is not his signature.

X-Q. Since when were you the secretary of Local 1781, that is Union de Trabajadores de Factoria, Refineria y Ramas Anexas? A. From the 25th of October 1951.

X-Q. Until when? A. Until the 22nd of April, 1953.

X-Q. Did you resign your position in the local? A. No.

X-Q. How come that you ceased to be the secretary of the local union? A. He was the one who retired me. He took me out of the union.

X-Q. Who is "he?" The defendant? A. Yes, sir.

X-Q. So on the 22nd day of April 1953, a few days after that document was sent to the bank, you were ousted from the union?

Mr. Rodriguez Antongiorgi: I object, Your Honor. That isn't what he said. He said that he retired him.

Mr. Perez Marchand: "Me boto". He expelled me.

The Court: Yes, "me boto".

[150] Mr. Rodriguez Antongiorgi: He did, but not the union.

Mr. Perez Marchand: We are seeing things in a different light.

X-Q. What happened, on April 22, 1953, if you remember, with regard to the union activities? A. On the 22nd of April, I came to my work at 1:00. When I arrived at the office I found a letter on my desk where I was told that I was definitely discharged from the union.

X-Q. Now, Mr. Silvagnoli, from the experience which you appear to have in union matters, were you a secretary at the will of the defendant, or were you a secretary elected by the union itself? A. Elected by the workers.

X-Q. Wasn't there an assembly of the union, Local 1781, held on the 22nd of April 1953? A. No, sir.

X-Q. You were not expulsed by a vote in open assembly on the 22nd day of April 1953? A. No, sir.

X-Q. But you do acknowledge that you were expulsed—

Mr. Rodriguez Antongiorgi: He answered that two or three times, Your Honor.

X-Q. By the authority, influence or intervention of the defendant? [151] A. Yes, sir.

X-Q. And are you on friendly terms with the defendant? A. No, not now.

Mr. Perez Marchand: No more questions.

Mr. Rodriguez Antongiorgi: No questions.

Mr. Romero: I would like to call Your Honor's attention to one fact on that letter that's been admitted in evidence, and has been mutilated. Will you allow me to call attention to one fact? Will you permit me to do it?

Mr. Rodriguez Antongiorgi: I don't know. Let's approach the bench.

(Counsel approached the bench).

Mr. Romero: This seems like an "L", and an "I". We have been talking about this one. I want to talk about this one.

The Court: If he can say what that was, you may ask about that. If he recognizes it, you may ask.

(Counsel withdrew from the bench.)

Cross Examination Continued

By Mr. Romero:

X-Q. If you saw any letter, specific letter that you made, would you recognize it as your own? I mean a letter like a, b, c?

Mr. Rodriguez Antongiorgi: He has already recognized some.

[152] The Court: He is asking about this other.

Mr. Romero: One specific letter.

The Court: A specific letter of the alphabet.

X-Q. An "A" or "B", would you recognize it? A. Yes.

X-Q. You see this document here?

The Court: He is referring to Exhibit 8.

X-Q. This here, what letter is that? A. I don't know what letter that is.

X-Q. It looks to me like an "L".

Mr. Rodriguez Antongiorgi: May we say there are no letters there. I can't recognize any letters there. It is just strikings of the pen.

Mr. Romero: But there is something that there was a signature, and I think beyond a doubt there was an "L" or an "I".

The Court: You ask him if he is able to recognize anything there as having been written by him?

X-Q. Do you recognize that as your handwriting? That part? A. I can not indentify that because, since it is cut there.

Mr. Romero: I just wanted to call your attention that his name is Silvagnoli, and that these letters are an "l" and an "i".

Mr. Rodriguez Antongiorgi: I am going to ask now, as part of the Government's case, to ask the jury to examine [153] these three exhibits and this fourth document where the signatures appear.

Mr. Perez Marchand: May the Court allow me to correct a statement in a question to this man?

The Court: Then, the members of the jury please wait until the attorney makes the question.

Mr. Rodriguez Antongiorgi: I didn't know there was another question.

Mr. Perez Marchand: It isn't a question. It is a correction of an incorrect question I propounded.

Cross Examination Continued

By Mr. Perez Marchand:

X-Q. I asked if he remembered the assembly held by the union on the 22nd of April, 1953. The correction is that it was April 26th.

The Court: You ask him if there was a meeting on the 26th.

X-Q. Do you remember if there was an assembly held by the union on April 26, 1953? That was a Sunday? A. Yes.

X-Q. Were you present at that assembly? A. I was present.

X-Q. You know what happened in that assembly, with reference to you? A. At that assembly Mr. Wadelmiro Arroyo informed the workers, principally the agricultural workers who were the [154] ones who frequented that assembly, there weren't any workers, or very few workers of the factory or the refinery. Then he informed the workers that he would present his resignation if the workers would assign to him another person who would have to sign checks jointly with him, because he needed, for the purposes of his movements, to go about with the checkbook on his person.

X-Q. And what happened. A. Nothing else happened.

X-Q. Was it before that assembly or at that assembly or after that assembly that you were expulsed from the union? A. Before the assembly.

Mr. Perez Marchand: Thank you, Your Honor.

Redirect Examination

By Mr. Rodriguez Antongiorgi:

Q. Isn't it a fact, Mr. Silvagnoli, that before you were expelled, as far as the union funds were concerned, you had to counter-sign the checks also? A. Yes.

The Court: No more questions to the witness?

Mr. Rodriguez Antongiorgi: No.

Mr. Perez Marchand: No.

The Court: Then, the members of the jury may examine those documents.

(The witness was excused.)

[155] (Exhibits 3, 4, 5, and 8 were passed to the jury for their examination.)

Mr. Rodriguez Antongiorgi: Your Honor, there is one piece of identification here which is Identification 19. This is a check in the name of "cash" with a note that says "gastos generales", issued against the Banco de Ponce by Wadelmiro Arroyo. We believe the check is admissible as such, since the check has been identified, since it was not for the purpose provided by the welfare fund, and it is a check to cash. And we offer it in evidence. I don't know if there is any objection.

Mr. Romero: We object on the same grounds that we have been objecting before to this type of evidence, that it is irrelevant and immaterial, and on the same legal grounds, and also that the check is not drawn from the welfare fund.

Mr. Rodriguez Antongiorgi: Oh, yes it is. It appears from the ledger.

Mr. Romero: Wasn't that the general funds? In the Banco de Ponce?

Mr. Rodriguez Antongiorgi: But that was where the $9,000 was placed.

Mr .Romero: How can you tell whether it is from the welfare fund or not?

Mr. Rodriguez Antongiorgi: Well, they have been intermingled.

[156] The Court: Anyway, the check was not cashed by the defendant, but by somebody else.

Mr. Rodriguez Antongiorgi: Whom we have been unable to identify. But I withdraw Identification 19.

The Court: All right, Identification 19 is withdrawn.

[Check to cash for $400, having been identified on the previous day and marked Identification 19, was withdrawn by the Government.]

Mr. Rodriguez Antongiorgi: There are several subpoenas which are from the banks, but they are cumulative. There is another subpoena that I issued to a Certified Public Accountant, Mr. Portela, who tried to audit these books subsequently. His name is Ramon Portela, and I make him available to the defendants if they wish to use him, and with that the Government rests. The witness is available in the corridor.

Mr. Perez Marchand: That's your case?

Mr. Rodriguez Antongiorgi: That's our case.

The Court: Are you going to make some motions?

Mr. Perez Marchand: Yes, Your Honor.

* * *

[157] Mr. Perez Marchand: To begin with, we shall say that we shall not bore the Judge with a review of certain portions of the testimony rendered in court, by specific witnesses for the Government because we know too well how exact the Judge is in his notes on the evidence rendered or given in court. But we do wish to emphasize one point under the charge, paragraph 4 of the indictment, the Government alleges that on February 24, 1953, or thereabouts, "at Ponce, Puerto Rico, within the district of Puerto Rico and within the jurisdiction of this Court, [158] the defendant, Wadelmiro Arroyo, did wilfully and unlawfully receive from the said Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc., a sum of money in the amount of $15,000.00, which sum was not received by him as compensation for or by reason of . . . etc." The rest of this paragraph is, as the Judge well knows and has heretofore referred to, a negative way of stating what is contained in paragraph (c) of Section

302 of the Taft-Hartley Act, or Section 186 of the United States Penal Code.

Under this charge the Government must prove that without any reference to the specific exceptions noted in paragraph (c) of the section referred to, the defendant wilfully and unlawfully received—for whom? For the defendant. For his benefit and his private personal speculative purposes. The proof as before the Court is indeed very abundant to the effect that Wadelmiro Arroyo, the defendant, received two checks drawn by the respective parties mentioned in paragraph 4 of the indictment, but not drawn to his favor but to the union, Local 1781 of which he was President on February 24, 1953. In other words, right from the start the evidence shows that if the defendant was placed in possession of these two checks they were not for his own personal speculative or illegal use, but for some use comprised and contained in the bargaining agreement which had just been signed by the parties and the union for which he spoke and [159] acted. Therefore, we must at that point accept that the checks were drawn legally and given to him in a legal way, and he received them personally he received them both lawfully and in terms of law.

The evidence shows that, not in violation of Article 186 of the United States Penal Code, Title 29, U. S. Code Annotated, but in violation of some other legal precept the defendant after having deposited the checks in the banks to the name of the Union, in the account of the Union, not for himself or to his name, in more than one way, drew on the funds for uses not implied in or contained in or referred to in the welfare agreement signed with the employers.

But that, in itself, is if anything proof of an alleged or supposed embezzlement of funds belonging to somebody else, of which he had control, but in no way a violation of

Section 302 of the Taft-Hartley Act or of its equivalent 186 of the Penal Code of the United States.

To substantiate our contention, we would like to refer to the cases of Ryan and Brennan, too well known to the Court to be spoken of in detail. To make this one point, in both the Brennan and the Ryan case, the charge was that the employers and the employees, or the representative of the employees, rather, had violated the law, the Taft-Hartley Act, and the Penal Code, because knowingly, wilfully, unlawfully they gave money, moneys to the defendants for the particular [160] use, which is really the question and the problem upper-most in the minds of the Congress when legislating to enhance and reinforce the labor legislation in making it a crime against the community, a rupture in the normal legal relations between labor and capital to use a representative of the workers by means of bribery, influence, or promises or the giving of anything of value which may induce him, the representative, to take a tortuous road and to act outside the scope of his obligations and betray—betray not only the interests of the union men affiliated under him but to destroy the confidence of the community in the just and equitable and well balanced relations between capital and labor.

In the *Ryan* case there was no evidence of checks, no evidence of checks to the union, not even to Ryan. The evidence was that he received money. He could have received checks. He could have received automobiles, anything of value, reads the Article in question. And that he did not deposit to the name of the union. He did not bring his moneys into the account of the union for him thereafter to draw upon and use that money. He simply kept it to himself, used it for himself. In other words, what we think and we hope that is encompassed in the section of the Taft-Hartley law or the Penal Code Section is in the light of the philosophy of the law the prevention of

bribery by employers through representatives of employees of the lawful exercise of the [161] legal and well acknowledged rights of labor to do or strike according to prevailing economic conditions of the day. Reading from Section 302, Title 2 of the Act, which is verbatim the Section 186 of the Penal Code, what this section makes unlawful and constitutes a crime is unlawful for the employers to pay or agree to pay to the employees' representatives, and for the employees' representatives to receive, any money or thing of value, subject to a penal sanction. Again, coming to the case at bar, we say, since under the indictment before this Court mention is only made of the acts and conduct of defendant Wadelmiro Arroyo as representative of the affiliated members of Local 1781 of the I.L.A., we must before we can conceive of not only the justice but the power to punish, we must first consider a test. The test for the true and juridical water-tight indictment is if besides — if besides the defendant Wadelmiro Arroyo this indictment had been extended to punish the employers for a crime which can not be committed by one party alone, because it is not a unilateral act, it is a bilateral act by which the employer gives to the representative of the labor union moneys or things of value, knowing that it is unlawful because it is against the policy, the philosophy of the labor law, so then we say the test is this. In the absence of a statement in this indictment making reference to the conduct, attitude, intentions of the two employers, could, or would the Government be able [162] if such had been the case—yes, if the employers had been jointly indicted, could the Government be successful against the employer? Obviously, no. The Government would be in the strange, if not sad predicament of having to say to the Court and jury, "Here's a legal act, under the law, done by the employers who have given money or things of value to this man representing labor who has wilfully and unlaw-

fully received that money or thing of value for his own personal benefit, contrary to the interests of the beneficiaries of the fund, contrary to the law, contrary to the very institution of labor."

We hold that as proven by the Government in this case, the embezzlement of funds is totally strange and absolutely divorced from the crime which Congress had in mind to define by Article 186, Sections (a) and (b). We hold that the Court—this Court—must give special attention to the fact that when taken together, the two sections, or rather the two paragraphs of the section, (a) and (b) have been held, considered and referred to as joint sections. There is not a disjunctive between the sections. It is not said that what is a crime for John is not a crime for Peter, that what John can do, Peter can not do. It says that John and Peter must have acted outside the law.

I am reading now from the treatise on labor law, by Professor Forkasch, Professor of Labor Law in the Brooklyn [163] School of Law, which is and has been referred to as a very exhaustive and comprehensive analysis of the LaGuardia-Wagner Act and the Taft-Hartley Act: the Wagner and LaGuardia Acts condensed and made into one piece by the Taft-Hartley Law as it is now enforced, and this book, at page 584, making reference to Section 302, Title 2 of the Taft-Hartley Act of Management and Labor Law, states as follows: "This section makes it unlawful for employers to pay or agree to pay to employees representatives, and for the receipt by these representatives of any money or thing of value." In other words, the two parties must have in mind, must know that they are acting outside of the scope of the law. The employer must know, must feel, that he is subordinating or bribing the labor representative, and the labor representative must know, must feel, as held in the *Ryan* case, that what he is receiving he is not receiving for his union, he is not receiving for

any legal purpose, but for his own enhancement, enrichment, benefit and personal use.'

In this case the union, Local 1781, and Central Mercedita, Inc., and Puerto Rican American Sugar Refinery, Inc. agreed to and signed a bargaining agreement containing a welfare fund clause, and in compliance therewith contemporaneously drew two checks. Those two checks, as the evidence shows, were drawn to the name of the union or local represented then and there by the defendant. The very checks show that [164] they were endorsed by the defendant and the secretary of the union to the only defect of making it a part of the union's funds. From that moment on, there is a total blanket over the employer and the employees, covering them and protecting them from any violation of the law. Because they have agreed to a legal purpose. They have signed a legal agreement. Checks have been drawn legally. The checks have been endorsed legally. If the crime was to receive unlawfully, there is no proof, absolutely no proof, there is not a scintilla of evidence to hold the receipt by Wadelmiro Arroyo as an illegal act. He must have received the money and the thing of value illegally. What course of conduct follows the delivery, which is the gist of the alleged crime, is really no concern of the labor law.

We must apply strictly the principle of interpretation in this case, *expresio unius es exclusio alterius*. What is not expressed in the law can not be written into the law, nor interpreted into the law. This Court, any Court acting for and within the orbit of the democratic system of justice of America can not legislate, can not even interstitially write into the law what the law does not contain. It has been held repeatedly that anything inferred, implied from words which have a specific meaning, amounts to judicial legislation, and is abhorrent to the constitutional system of America.

[165] We hold that only by interstitial judicial legislation could our distinguished brother in the law bring about a conviction of Wadelmiro Arroyo under the terms of the Government's indictment in this case, and by exclusion of the employer who must have and should have been included in the indictment, inasmuch as this is not a unilateral act but a bilateral act, and the parties must respect and observe the law accordingly.

In fine, Your Honor, we submit that on the very strength of the letter of the indictment in this case, and the evidence produced by the Government, the only problem is this: that the indictment charges violation of Section 186 (b) of the United States Penal Code in that the defendant wilfully and unlawfully received the moneys referred to in the indictment, and that defendant wilfully and unlawfully should have received the money in order to be guilty of the crime, has proven through the District Attorney's evidence that he received the checks lawfully because they were not made to his name and were not for his own particular use, and that eventually, as the evidence shows, he may have made unwise, unauthorized and even illegal use of that money, but on the strength of that evidence it is the Government itself who has proven its case is out of this court. This is not the court to try an embezzlement of union funds. We submit the case.

[166] Mr. Rodriguez Antongiorgi: May it please the Court. Your Honor, practically all the points that have been raised by my colleague here are decided in the *Ryan* case, and of course we realize on the *Ryan* case a unanimous opinion of the United States Supreme Court, a very rare thing.

I will take them one by one. The last one made, that the employer should have been charged, these are completely separate offenses. The employer may or may not be charged. That came up in the *Ryan* case, and in the

footnote that appears, reading from the *Ryan* case, that's page 300, footnote number 1, it says, "The previous section, 302(a), makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." The record does not disclose whether the Government has taken any action under this section against the employers involved."

As a matter of fact, in the *Ryan* case, the employer was not charged. In this court, and in other cases, the employer was or was not charged. The Supreme Court did not decide that. They passed over that. It was decided we don't have to charge them. The employer in this case, I would like to say, complied with the law. The employer set up a welfare fund in accordance with the law, and in accordance with the testimony by Mr. Goyco and other documentary evidence, the letter to the Banco de Ponce, the employer did all it could to make compliance with the law, because [167] there could be a lawful welfare fund, so that's as far as the employer is concerned.

Now, the one before the last point raised by Mr. Perez Marchand, that this requires a liberal or broad construction. This is what the Supreme Court said in the *Ryan* case as to that, on page 305, around the middle, it says, "Thus a narrow construction would frustrate the primary intent of Congress."

That's exactly what the Supreme Court of the United States did when they interpreted Section 186 in the *Ryan* case. As far as the welfare fund is concerned, that clearly is within the scope of the Act and precisely the reason the Supreme Court had to give a broad construction to the word "representative" and because as they said, and I read that yesterday to the Court, they even cite a case in the opinion. They say "The United Mine Workers' de

mand" that's pages 304-305 "that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act."

Then they cite Senator Taft, going to the legislative history, "The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the union representative is shaking down the employer. . . .' " by demands for the creation and establishment of welfare funds. So what Congress did was to permit [168] the creation of welfare funds but of course to put certain restrictions on the operation of that welfare fund.

If this Court were to hold the theory of Mr. Perez Marchand, that because these checks were made to the union and not to Mr. Arroyo, that because there was a lawful delivery, physical delivery of the checks, that there is no violation under the Act, under the subsequent evidence and the evidence would not be admissible, then we would be doing what the Supreme Court says can not be done, to frustrate the intent of Congress, It would be very easy to evade the Act if all that was contemplated was that there be a physical delivery of a check made to the union, and then forget about it.

The Court: No, but can't you see the provision itself contains a section that grants this Court jurisdiction to enjoin . . .

Mr. Rodriguez Antongiorgi: That's right.

The Court: . . . the parties from doing that precise thing, so that I don't believe that with that the law would be barred because it can be enjoined.

Mr. Rodriguez Antongiorgi: On the civil part, but the Taft-Hartley Act has civil and criminal provisions, and under this interpretation of the Supreme Court, the criminal provisions were applicable to all the exceptions, because there is a crime defined here, a crime covering a

number of exceptions, and the Government in this case has alleged each and [169] every one of the exceptions and particularly in the welfare fund has negatived the exceptions. What happens? The Government puts upon itself the burden, when it did that, to prove that this defendant did not come within the exceptions, and the Government has proven that through the testimony that has been produced here, documentary and verbal testimony to the effect that this fund was created for the sole and exclusive purpose of providing medical payments under the welfare fund. So when we prove, as we have done here, that—of course through that testimony, we have negatived all the exceptions because the sole and exclusive purpose was for that, and that was testified to very clearly and definitely by Mr. Goyco, and that's covered by the documentary evidence.

The Court: And it was received for that purpose.

Mr. Rodriguez Antongiorgi: It was covered even by the vouchers, that it was received for that purpose.

The Court: Now, I have many doubts in this connection, Mr. Rodriguez. I must be frank with you. Sub-paragraph (b) of Section 186, Title 29, U. S. Cose Annotated provides that "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." Then, sub-paragraph (c) contains the exceptions.

I believe that the crime consists in that the [170] representative charged receives money or other thing of value from the employer. A union may be a representative too, so that a union may be also charged with the commission of the offense. The evidence here is to the effect that the union was the one that received the $15,000 from the employers. The checks were made to the union for the wel-

fare fund. The checks could not have been collected or cashed by the defendant alone. They were deposited in a bank account designated as "Welfare Fund of the Union", and the checks were endorsed by the defendant and by the secretary of the union. So far as I see the evidence, the primary purpose that the employer had, and that the union apparently had, was to create a welfare fund under . . .

Mr. Rodriguez Antongiorgi: Under the exception.

Mr. Perez Marchand: (5).

The Court: . . . (c)(5). That purpose as regards the employer was complied with, and the delivery was lawful, because the employer delivered to the union, through its president, the checks provided for the creation of the fund. It appears from the evidence also, that the employer was not hiding anything. That the employer, in good faith, agreed to the creation of the welfare fund, to do all it had to do until the fund was delivered to the union and deposited in the bank.

Now, if from there on something happened without the consent, acquiescence, or instigation of the employer, I fail to see how that situation would come within the provisions [171] of the section. It would have been different, and of course I don't have a fixed mind as to that. I want you to convince me of the opposite. If the employer had taken the position of *laissez faire*, "Here are these $15,000, you do with them as you please. I don't want anything to do with that." And then it would have happened what the evidence shows has happened, that is very reprehensible, that amounts to embezzlement, amounts to what must be put a stop to here, a sort of racketeering by labor leaders against the employees, against the laborers, and the employer did not consent to that. The evidence shows the opposite. The employer was insisting that that was wrong . . .

Mr. Rodriguez Antongiorgi: To try to comply with the law.

The Court: Yes, so that the *mens rea* in this case—it is very doubtful that it has been established, because the section does not say that it shall be unlawful for the representative to receive—period. It says to receive from the employer, and all the statements in the *Ryan* case about the legislative intention point out that the purpose of this section is to avoid that unions shake down the employers by requiring the employer to do this and that, etc., and that the employer says, "Well, to avoid strikes, etc., I will give money to the representative", and the representative is not only an individual according to what the Supreme Court says in the *Ryan* case, it may be the union itself. [172] The union here isn't charged with the commission of the offense.

Mr. Rodriguez Antongiorgi: No.

The Court: I would have no doubt that if the union would have been the defendant here, joined with him, then the position would have been different, because the union received the money and the union received the money with some other, ulterior, improper motive. But here the situation is different.

Mr. Rodriguez Antongiorgi: This is the situation as we see it, Your Honor, and we will try to make it very clear. First, this statute does not require a *mens rea,* and the Supreme Court held that when they said, as the statute reads, it appears to be a criminal provision, a *malum prohibitum.* In other words, it is a public policy, where no *mens rea* is required.

The Court: But you see in section (d) where it has to be done wilfully—

Mr. Rodriguez Antongiorgi: But there are a lot of decisions where the word "wilfully" means it is done voluntarily, and therefore does not need *mens rea.* Even if there is a requirement of *mens rea,* there is at least sufficient showing to deny this motion. This is the position of the

Government. These checks are received by this defendant —personally, by him. This defendant, without holding a [173] meeting of the union as testified by Mr. Silvagnoli, goes over to the bank, contrary to what had happened in previous years, this defendant goes to the bank and even there is evidence here that the required signature of the secretary was put in there by somebody else, not the secretary of the union, the defendant goes to the bank, opens an account in which he insists on a violation of the collective bargaining agreement, and in violation of the committee set-up that all payments on that account must be authorized, then the defendant himself from there on starts drawing checks personally on that account. There are statements by Silvagnoli that the defendant himself told the member of the union that he had to have a checkbook with him in order to draw checks from the fund.

The Court: But as to that, Mr. Rodriguez, I believe that we should separate the situation. Once the fund was lawfully established and deposited in the care of the union, what happened later would be embezzlement, would be racketeering, if you want to call it that, and it is most reprehensible and is abusive of the trust imposed by the laborers in these labor leaders, but that does not mean that it was a receipt by the defendant from the employers. The fund had been received by the union from the employers. In fact, had the bank been notified by the employers and the union that these funds were to be used as said in the opening of the account for welfare [174] purposes and that the moneys therefrom were to be drawn by checks signed by the defendant and counter-signed by the representative of the employer, the law as to the creation of the welfare fund would have been substantially complied with.

Now, if that did not happen, still as regards the employer the evidence is that the employer did its best to.

see that the law was complied with. So that the employer did not participate in anything. It does not appear that the employer made a delivery or placed the fund in such a way knowing that the defendant would have had access to those funds for his own personal use, and not the uses contemplated by the law.

Mr. Rodriguez Antongiorgi: But everything done by the defendant was done contrary to the establishment of that welfare fund. He went to the bank and got himself—

The Court: But that's the confusion. Let me explain to you. Let me clarify that. We are not discussing here, and it is not at issue here, whether the law was complied with or not as regards the administration and management of the fund. That's not at issue.

Mr. Rodriguez Antongiorgi: We say, Your Honor, that this statute, especially as the wording of the Supreme Court where it says over here, "The narrow reading of the term 'representative' would substantially defeat the congressional purpose." [175] And then, "In 1946, Congress was disturbed by the demands of certain unions that the employers contribute to welfare funds which were in the sole control of the union or its officers and could be used as the individual officers saw fit." And that's what the Supreme Court said is a violation of the statute. That's exactly what we have proved in this case. This fund was in the sole and complete control of this defendant as representative of the employees, and then he goes, if Your Honor will permit me to try to link the evidence with the theory of the Government, then the defendant goes to the bank, gets the checks, and then we proved that he had a personal account in the bank, and an account in the name of the fund, and what does he do? Makes a check from the union account of $700, and transfers it to his own personal account.

The Court: He embezzles money from the union account.

Mr. Rodriguez Antongiorgi: The statute clearly contemplates an embezzlement, and that does not deprive the Federal Court of jurisdiction. When they say "sole and exclusive control" they say there could be an embezzlement, and that is contemplated by the statute precisely if there is shown an embezzlement of the welfare fund. That's the precise thing Congress had in mind when they passed this law, and when the Supreme Court says over here, and mentions the case of the United Mine Workers, and says that Congress was disturbed by their demands that employers contribute to welfare funds [176] which were in the sole control of the union or its officers and could be used as the individual officers saw fit. They are thinking of an embezzlement specifically when a man who has sole and complete control which belongs to a benefit account uses it as he sees fit. This is a crime under the local laws of many states, and there is no duplicity of laws, and that is contemplated by the Supreme Court. If Your Honor has doubt as to that, since it is now 12:00, I would like to have a recess because as I read this—how else, Your Honor, could there be a protection of a welfare fund for the purpose that the Supreme Court says here? When the officer has complete control of it, and uses it for his own benefit? That's what the Supreme Court says is covered by the Act. How in the world could there be any other, and that's the precise situation that has been presented before this Court through all the evidence in this case. Either, whether we take it that there is a *mens rea* required here, or we don't take it, because there is enough evidence to go to the jury to infer a *mens rea*.

The Court: The thing I am afraid of about this statement of the Supreme Court is that it is merely *dictum*.

because the Supreme Court there was only concerned with the definition of the term "representative."

Mr. Rodriguez Antongiorgi: Yes.

The Court: And that was all that was before the Supreme [177] Court in the Ryan case, and whatever the writer of the opinion said, that is mere speculation. He was not construing that particular sub-section (b) in the light of that statement.

Mr. Rodriguez Antongiorgi: If they are talking about welfare funds and Your Honor it might be *dictum*, but they mention this for the purpose of their own holding, to hold that a representative comes under and is indictable under the Act, and how do they show that? By showing that if a representative of the union were not indictable under the Act, then this part of the statute would be defeated, and the Supreme Court says we can not do that.

The Court: No, because in the Ryan case there was no welfare fund involved.

Mr. Rodriguez Antongiorgi: Yes.

The Court: There was a case where this stevedoring company was paying $1,000 to Ryan every month, and nothing more. It wasn't for a welfare fund or anything else. It is simply a payment made by the employer to Ryan. And that's what they had, because all the facts they had—they had no case of a welfare fund before them in the Ryan case, so that is clearly *dictum*.

Mr. Rodriguez Antongiorgi: A clear *dictum*, but the wording of it must have weight with the Court. And now, *dictum* or no *dictum*, from the Supreme Court, I make this statement and appeal to the legislative history which is the one that was taken by the Supreme Court over there. They are basing it on the legislative history to protect the welfare [178] funds as cited by the Supreme Court in this opinion. And if this is a matter of first impression, I make the argument that this statute, in order to give it

the meaning that Congress had in making it a statute *malum prohibitum*, and as the Supreme Court says, "The narrow reading of the term 'representative' would substantially defeat the congressional purpose." A construction like this would be a frustration of the intent of Congress in protecting the welfare funds.

The Court: You know, there are two sides of the question. A narrow construction would frustrate the purposes of the statute, but a too-broad construction would then constitute legislation.

Mr. Rodriguez Antongiorgi: I would say this, Your Honor, as I see this evidence. If the evidence in this case were to the effect that a committee was set up and that this defendant, right from the beginning, from the start, does not do the things that they desire, and afterwards if they comply there may have been an embezzlement of funds, this connected with the original transaction, that of the payment of those $15,000— you may have a situation where there would be a broad construction. But in a case in which the evidence is so clear as here, Your Honor, especially on a motion for judgment of acquittal in which right from the start the very minute the man goes to the bank, the very [179] minute of refusing to meet with representatives of the employer, is a violation of the welfare fund. The minute he starts drawing from the account, mingles the $9,000 with the other funds, from the moment the payment was made February 20th, there is a continuous transaction from this defendant, so I say that under that construction it clearly must be the way we are giving it to the statute. There is a transaction starting with, beginning from this defendant, and there was an illegal payment to him because from the moment it was made, the fact it was made out to the union was completely irrelevant and immaterial, because it was shown by the evidence

he had sole control. It was an illegal payment for an illegal purpose under the Act.

If we don't have a case with this evidence under that, especially when we have alleged here and have set up and taken the burden of proof, when we have negatived the exceptions, then that sub-section (c) is out and there could be no violation under that, and that is not what the Supreme Court said.

The Court: I disagree with you. Anyway, I am not going to decide this question now. I believe I should give the United States Attorney time to expand his argument in this matter, and of course give the defendant time to answer the United States Attorney's argument, look for whatever cases you have or any legislative history or any commentaries, etc.

[180] Mr. Perez Marchand: I should want to have a very short time for a reply.

The Court: But you are not going to reply now. You may be sure he is going to continue his argument. I am not going to stay after 12:30. Then, we will recess until 2:00, then excuse the jury until tomorrow.

Mr. Rodriguez Antongiorgi: That is agreeable.

The Court: So you may have plenty of time. This is a very serious matter and I don't want to decide it in a hurry. I want to give an opportunity to the United States Attorney and to the defendants to bring to the Court a clear picture of the law as it is, and must be, so that the Court may be in a position to decide the question, doing complete justice to the Government and to the defendant.

And of course I must repeat that the fact that the evidence shows a horrible situation in managing and disposing of funds belonging to laborers by this defendant as a labor leader, and a conduct that no doubt must find some correcting in the law—of course, that should not in any way, no matter how I may appreciate that evidence, it should

not in any way prevail in my interpretation of the Act. If the case does not come under the Act, well, my only duty would be to grant the motion. If the case comes under the Act, then I will deny the motion and give the defendant the opportunity to offer his evidence and let the case go to the jury. We will be in recess until 2:00.

[181]. (The noon recess was then taken.)

The trial of the above entitled case was resumed at 2:00 in the afternoon of the same day, pursuant to the taking of the lunch recess, all parties and their counsel being present as before.

The Court: Ladies and gentlemen of the jury, please observe the instructions the Court has already given to you. We are not yet ready to proceed with the case. You will be excused to the jury room until 2:30.

(The jury withdrew from the court room.)

Mr. Rodriguez Antongiorgi: May it please the Court, Your Honor, I have a few more points that I would like to bring for Your Honor's attention. The first one is this. Even under what I call the narrow construction of the Act, in other words, that there is an illegal receipt of money by Arroyo, the evidence in this case, and as Your Honor knows checks are merely formal documents through which money is passed over. And under the circumstances of the evidence of this case, Your Honor, the circumstances of the opening of the account, the personal benefits proved of money received from that sum of money, from this defendant himself, for the purchase of a car, furniture, $600 transferred to the other account, there is a question of fact, Your Honor, that I believe should go to the jury, under even a narrow construction because the jury is entitled under the instructions of law [182] that Your Honor may give to the jury, under the interpretation of the Act, is entitled to determine from that evidence whether this defendant received or not, and it wasn't the union who

received it but himself, who received that benefit and certainly would be covered under the Act, even under the so-called narrow construction of the Act, which of course I contend should have a broader construction.

There is another point I make, on this motion. There is something else that I would like to bring to Your Honor's attention. Of course, that depends on the discretion of Your Honor, and that is the Rule under which this motion is made, which is Rule 29. I have it here, under sub-section (b). Your Honor has the discretion to reserve this decision until the defendant presents his evidence, and there is no prejudice whatsoever because they have the right, even if there is a conviction, even after he is sentenced, they have the right to arrest the judgment and this would be exactly the proper case and the proper practice to do it, for one reason, Your Honor, because if we are wrong in the interpretation of the Act, then it would be a judgment from Your Honor in arrest of sentence, in which the Government has the right—

The Court: Yes. To appeal.

Mr. Rodriguez Antongiorgi: Under the statute to appeal directly to the Supreme Court of the United States, and of course this is a very important matter, as Your Honor said, [183] and a matter of first impression, and of course the proper practice would be for the defendant to present this evidence and the whole record to go before the Supreme Court on the question of the interpretation of the Act. So no prejudice could come to these defendants, they can move for acquittal after the evidence is in, and could present any evidence pertinent to this question, and if that is denied by Your Honor they would have the right in five days, if there is a conviction, to arrest sentence, and then the Government would be in a position to make a decision in view of the—

The Court: It would be a motion for judgment *non obstante verdicto.*

Mr. Rodriguez Antongiorgi: To go into this matter which is of great importance initially to decide if they wish to take an appeal to the Supreme Court, so I believe that at this time for the first reason, that there is a question of fact for the jury to determine under the narrow construction of the Act, and for the other point of procedure under any circumstances, I believe the motion should be denied at this time, and we should proceed with the case, and with that I submit.

The Court: I must say before going further in this argument, for the benefit of counsel of both parties, that during the recess I have given more thoughtful consideration to the evidence of record, to the law, and to the statute, and to [184] the decisions, and I have convinced myself that the doubts I expressed this morning about this question were completely unfounded. That this question is raised on the basis of the provisions of the statute as to whether the defendant received money, any money or other thing of value from the employer. No doubt that is a question of fact. And that's a question of fact entirely within the province of the jury. There is evidence before the Court that may be analyzed, considered, and weighed by the jury, to enable the jury to make a finding that the defendant received money or other thing of value from the employer. The statute does not say, nor does it distinguish whether the money or other thing of value is required to be received directly or indirectly from the employer, and I have to follow the maxim *ubi lex non distinguit nec nos distinguere debemus,* so that the statute is susceptible of being construed that an indirect receipt of money or thing of value by the defendant from the employer comes within the provisions of the statute.

The purpose for which the money is delivered by the

employer, and the purpose for which the money is received by the representative of the union need not be the same. In other words, when the purpose of the delivery of the money or other thing of value by the employer to the employee is, and there is no doubt that the employer knew that it was for an unlawful purpose, even if the representative didn't know it [185] was for an unlawful purpose, then the first sub-section of the section applies, that is, the employer may be indicted as trying to influence the representative of the union—nevertheless, the representative of the union, in good faith, may believe that he is receiving the money for a lawful purpose, then the statute does not apply to him. If both knew that the purpose was unlawful, then of course both of them commit the crime. However, if the employer delivers the money for a legitimate, lawful purpose, without anything back in his mind, while the representative of the union receives the money in contemplation of something unlawful, then that's the purpose which predominates for indicting the representative of the union.

In this case there is preponderant evidence on which I have not to rule, it is the jury who determines that, but there is preponderant evidence in the sense that this defendant who no doubt under the evidence dominates the union, he is the factotum of the union, knew, because he was the president of the union, and the bargaining agent, and the representative of the union in the past, that in other welfare funds created for the years 1951 and 1952, I believe, by the same employer and the same union, the law had been observed, that the deposit of the funds originally delivered by the employer was made by the employer's trustee, that is by the representative of the employer in the trust fund, in [186] a bank account, and that the authorized signatures were those of the defendant as president of the union, and as countersigned by the signa-

ture of the representative of the employer. In the past that representative was Dr. Clavell, I believe.

It further appears from the evidence that the defendant, before the collective bargaining agreement was signed containing this provision about the welfare fund, while it was being discussed and prepared by Mr. Orlando Antonsanti who prepared the original draft, the defendant told Mr. Antonsanti that he was going to be the representative of the union, in that welfare fund, without the contract having yet been signed, and the union having not passed any resolutions as to who was going to be the representative.

It further appears from the evidence, that when the contract was signed and the checks were issued Mr. Goyco showed the checks to the defendant and the defendant asked Mr. Goyco to give him the checks. He did not say for depositing them in the bank, he said he wanted to show those checks to the members of the union at a meeting they were having on Sunday. Mr. Goyco did not see the checks any more, and did not have the opportunity of complying with past practice of going to the bank, not the National City Bank, but the Banco de Ponce, the one authorized in previous agreements, to make the deposit as in the past.

[187] It further appears from the evidence that the defendant presented to the National City Bank, before these checks had been converted into money or anything of value, because they are simply orders to pay, a Resolution of the union that the only authorized signature on those funds should be that of the defendant. The testimony here of the secretary of the union is to the effect, that defendant had told the members of the union that he wanted that Resolution because he did not want to go chasing for any other member, any other officer of the union to sign the checks, that he wanted to have the check book in.

his pocket with him at any place where he wanted to go, or had to go, and be able to withdraw from that fund as he pleased.

It further appears from the evidence that this alleged certificate that was delivered to the National City Bank on the date that the checks were deposited, the signature of the secretary, the certifying secretary was made by somebody else. The secretary testified that he did not sign it.

It appears that with that Resolution in his hands; and with all the background of his doings up to that time, he goes to the National City Bank, opens the account, the only authorized signature on that account is the defendants. He is called by the employer several times, by Mr. Goyco, refuses to go, and that account is not complying with the terms of the welfare fund as created in the past, and as agreed.

[188] Then he starts to draw on those funds with his own signature. When the funds are depleted and reduced to $9,800, and I believe it was at this time that the National City Bank was advised that they could not go ahead with this thing because it was a trust fund, they were advised by the employer, he gets a manager's check from the National City Bank for the balance of the fund and closes the account and deposits the full amount of the check in another account in the Banco de Ponce, mingling it with other funds of the union in the name of the union not designated welfare fund, simply a drawing account, on which the only authorized signature is the defendant's signature.

No doubt this evidence is sufficient to permit the jury to find that the defendant actually received from the employer the moneys he drew from this account for his own personal purposes, and that these funds were not received by the defendant, nor did he intend to receive them, in

pursuance of the creation of the welfare fund referred to in sub-section (c) (5) of Section 186 of Title 29. Therefore this is a matter entirely within the province of the jury, to be dealt with by the jury, and the jury is entitled to make a finding whether the defendant received either directly or indirectly from the employer the funds shown by the evidence.

I have carefully read the Ryan case, and there is no doubt that the statements in the Ryan case give weight to [189] that what Congress intended by this statute was primarily to avoid that the employees, that the laborers be defrauded in their rights, that is, that the representatives of the laborers in collective bargaining forget the laborers as to certain vital rights they could claim in a sense of personal benefits to be derived by the representative. That does not necessarily mean that the employer must be combined with the representative. In some cases it must be the result of a meeting of the minds between employer and representative, but in other cases it would be simply that the representative in the expectation and assurance that he is going to get some money from the employer for his own personal use, may not be so strong in bargaining on behalf of the laborers to gain for the laborers all the rights that they may be entitled to under the circumstances.

The employer, in that situation, may be entirely innocent, but still the representatives may say, "I am not going to press this too much, because then I may not be able to get this money." And the laborer is in that way defrauded in his rights. That may be a bribe, Mr. Perez Marchand talked about a bribe, but the principal purpose, I believe the vital intention of Congress wasn't a question of bribes, because bribery can be reached through other criminal statutes of the country. There are even other instances. In racketeering it can be reached by the anti-

racketeering Act, which is [190] a criminal provision different from this one. Now, as to embezzlement. The fact that the evidence may be susceptible of supporting a conclusion that the defendant embezzled funds, that does not in any way prevent the Federal statute from applying. There may exist a violation of the Federal statute, and still there may be charges for embezzlement under the criminal laws of the Commonwealth. Both are different crimes, and both may co-exist. Those are the facts that the Court has. If Mr. Perez Marchand or any of the attorneys of the defendant want to argue anything, that may tend to show that the Court is wrong in these views, I will be glad to hear it.

Mr. Perez Marchand: If I may please the Court, since the Court's ruling has gone before the solicited reply of counsel for the defense to arguments by the Government's counsel, I beg to be allowed a reasonable period of time to sustain three points which I think are essential to the motion for acquittal, and which in our opinion justify a reconsideration.

The Court: I have not ruled yet. I want to clarify my position of this morning so that you may not argue the case believing that I still had that same opinion.

Mr. Perez Marchand: Well, I would like to submit for the record the Supreme Court case where it has been specifically held that favors, payment of value, or things of value [191] under Section 186 are nothing else but bribery, and as such considered in the light of the history of the statute. With Your Honor's consent we shall start by making a reference to that portion of the Court's statement which makes the appropriation of funds by the defendant synonymous with or equivalent to the specific statutory word, "receipt". We very courteously and respectfully beg to disagree, because to receive is not the same as to appropriate. The reason we say this is because

there is not in any of the cases nor in the histofy of this statute any reference, direct or indirect, to the verb "appropriate" and the action of appropriation by the individual concerned. Everything turns or hinges around the idea and the concept of having received in an illegal manner, unlawfully and knowingly.

Then, again, there is another point we want to make clear in this short reply, and that is that from the argument of my distinguished brother attorney for the Government, he harps and repeats the importance of *mens rea* in this case, and therefore—

The Court: You don't need to argue on that, because I believe the evidence is convincing about the *mens rea*. I am not going to permit you to argue about that, because I am convinced that the evidence is convincing about that.

Mr. Perez Marchand: If Your Honor please, I am not trying to argue that the evidence is convincing of the *mens rea*. [192] What I am going to try to bring to Your Honor's attention, that in the light of the statute and the cases the *mens rea* is no part of this prosecution. It has nothing to do with the case. This is a *malum prohibitum*.

The Court: Well, much the better, then.

Mr. Perez Marchand: And as stated by the Supreme Court as such, but the legal situation, it has nothing to do with the intention of the man. So we shall begin our replica, referring to the District Attorney's reference to Silvagnoli, the secretary of the union, whose signature he says is not genuine on the documents submitted as the letter of instructions from the union to the bank.

Be that as it may, the letter and the disputed genuineness of the signature of secretary Silvagnoli on that document have only to do with the management and disposition of the checks received by the defendant from the employer.

The Court: No, it does not say that. All the Resolution says that in any account to be opened by the union

for this welfare fund, the only authorized signature is that of the defendant.

Mr. Perez Marchand: That is exactly it. In other words, the union, communicating with the defendant on the same purpose, tells the bank—

The Court: I disagree with you. The jury has the right to find on the basis of the testimony of this witness that [193] was not an act of the union, because it is only, if the only signature is that of the defendant, it is an act of the defendant, it isn't a certificate of any Resolution of the union. It is simply an act of the defendant alone, not an act of the union.

Mr. Perez Marchand: If it may please the Court, I then insist that we have a right to state for the record that we insist that that kind of evidence should not go to the jury. We want to be on record as to that. For the reason that we earnestly and consistently hold that no measure of evidence that deals with or reflects embezzlement is a part of this prosecution, that this prosecution under the law and the cases is and must be strictly limited to the lawful or unlawful receipt of money or things of value by the representative of a labor union.

The Court: For that purpose was that admitted by the Court. It was the unlawful receipt of money by this defendant as representative of the union under the guise, under a scheme pretty well prepared by the defendant, of a so-called welfare fund.

Mr. Perez Marchand: We still hold, Your Honor, that by coloring the evidence in that manner we are painting a different picture than the law demands. In other words, we can not read into the document nor can we read into the law. The document will speak for itself.

[194] The Court: Well, the people who are going to read the document are the jury, not myself. I am simply explaining how the jury may react. They may react an-

other way. They may give much or no importance to that, that's their province, but I have in order to justify that this is a case that should go to the jury, that that's a right that the jury has, that's the power of the jury. I can not tell the jury, "Disregard this document. I don't believe the man was telling the truth." I can not tell them, "Give full weight to the document, because the signature is forged." That's up to them. They heard the witness, they see the document, they may give or not give any importance to the document, but that's for them. For the purposes of this motion I can not invade the province of the jury.

Mr. Perez Marchand: Our point still is, if I may please the Court, and I hope and wish and ask that the Judge be patient and not consider this—

The Court: I don't want to lose time, that's all.

Mr. Perez Marchand: This is so essential that we are ready to beg the Court to give us time to expand our theory, which at this point—

The Court: I will give you ten more minutes.

Mr. Perez Marchand: —at this point is that it is error to ask the jury to interpret a point of law. The jury can not interpret from the document whether the law was complied [195] with, whether the man received lawfully or unlawfully for the purposes of the statute. That is for the Judge to determine and to direct the jury to do or not to do, but being that we have been limited in our argument, we shall to begin with state that in case which clearly is not mandatory on this Court, but is a *stare decisis; United States* v. *Brennan,* 134 Fed. Supp 47. The Court reached this conclusion: "An apparent purpose of Section 186 (a) and (d) from a reading of it, and also from a reading of the new section added to the preamble to the so-called Wagner Act (re-enacted by the 80th Congress) by the Taft-Hartley Law, is to preserve the integrity of the labor

management relations by prohibiting bribery, extortion, or any form of dishonesty as between employer and employees."

The Court: Or any form of dishonesty—that's it.

Mr. Perez Marchand: Now, in the case of *United States* v. *Universal Credit Corporation*, 97 L. Ed. 260, at page 264, Justice Frankfurter, interpreting the problem of Section 186, goes on record as follows, "When choice has to be made between two readings of what Congress has made a crime," what Congress has made a crime, "it is appropriate before we choose the harsher alternative to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implications." [196] Now, this is typically the case for implications that look either way. My distinguished brother attorney for the Government has graciously admitted that there are two views, the narrow and the liberal view. We say that that being so, under this decision we are not and should not feel at liberty to tell the jury which way to go, and as Justice Frankfurter says, better that Congress make it clear than us read into the letter of the law and derive criminal outlawry from ambiguous implications of the statute.

The Court: Justice Frankfurter was not referring to this statute. He was referring to some other statute, wasn't he?

Mr. Rodriguez Antongiorgi: As a matter of fact, Justice Frankfurter concurred in the Ryan case.

The Court: It isn't this statute.

Mr. Perez Marchand: A statute that has reference to criminal outlawry, and this is the rule of conduct for tribunals. Then we go directly to the Ryan case. I think that headnote three of the Ryan case as set down by Justice Clark should be read and considered very carefully. Therein Justice Clark goes on to say as follows:

"Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of 302 is such that the only reference to [197] welfare funds is contained in 302 (c) (5)." "As the statute reads, there appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."

The Court: You omitted a paragraph between those two paragraphs. It says, "If Congress intended to deal with that problem alone it could have done so directly, without writing a broad prohibition in sub-sections (a) and (b), and 5 specific exceptions thereto in sub-section (c), only the last of which covers welfare funds."

Mr. Perez Marchand: Yes. We had given that by citing Justice Frankfurter's statement.

The Court: When you quote, quote the entire language.

Mr. Perez Marchand: The entire language is in the next paragraph, and that is the important part of it, because the history of this statute is of importance. "The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization'. The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the union representative is shaking down the employer'."

In other words, in order to be convictable under Section 186 (b) and (c) there has to be proof that the [198] unlawful receipt was the result of the labor union or the representative of shaking down the employer.

The Court: Oh, but you read that it was an additional ground. The scope was enlarged to include it. It means

that it included other things, but it also included the shaking down of the employer.

Mr. Perez Marchand: It winds up to say that that is why the result of the Senate amendment made it a criminal offense, both for the employer and the representative of the employees. In other words, Your Honor, we hold and contend that under the law and the cases there can't be a case of this nature, it should not be turned over to the jury for disposition of mixed questions of law and fact, because we are incurring in the criticised attitude pointed out by Justice Frankfurter, we are deriving criminal outlawry from ambiguous implications in the law and in the second instance because, as acknowledged by the Government and known to us all, this is the first case in the history of the labor law of the United States and we should be very sorry to establish a precedent counter to the elements and principles of justice.

Mr. Rodriguez Antongiorgi: Your Honor, I would like to mention for the record, if you will permit me, as Your Honor asked me this morning to put on record the citation of the Conference Report on the legislative history of the Act, in the U. S. Congressional Service for 1947, at page 1173 [199] which covers the restrictions on payments to employee representatives, which is cited by Judge Clark in the Ryan opinion, and of course this fully supports our view, and it ends by saying that this amendment made in the Senate to which Judge Clark referred, says violations of this section of the Senate amendment were made punishable by the fine, etc., etc. And this paragraph of the Committee Report fully supports the idea we have taken, that is the idea of Congress was to make it as wide as possible, cited by my colleague in the Minnesota case on dishonesty between employer and employee.

Mr. Romero: May I ask for a few minutes?

The Court: Yes.

Mr. Romero: I wish to point out, Your Honor, a fact that has seemed to have escaped.

The Court: You have five minutes.

Mr. Romero: And it is that the main thing we must have in mind when we think of the violation to the statute is that as to the relation between the employer and representative of the employees the statute forbids the payments and receipt from the representative of the employees. He receives a payment from the employer. It is a relationship from employer and representative of employees. In this case, either these checks were given to the union, and then the proof—let us say for the sake of argument, admit that the whole proof shows [200] that Wadelmiro Arroyo was to take those checks for himself from that moment. Well, that is no relationship with the employer, is it? An internal intention, which is not looked upon by the Act, because it is *malum prohibitum*. The intention does not enter into the law. We are looking at a law which forbids the payments and the receipt. Wadelmiro Arroyo receives the checks for the union. His intention to do with those checks what he may, has no bearing upon what the law forbids, the offense charged by the law, and as the case of Brennan says, extortion or any form of dishonesty as between employer and employees—it does not say dishonesty of the employee or representative himself.

The Court: It is dishonesty between employer and employee because the employer gave the money for a certain purpose and the representative of the employees used it for an illegitimate purpose. That's the dishonesty.

Mr. Romero: We cite the case of *United Marine Division I.L.A. v. Essex Transportation Co.*, 216 F (2) 410, where the Court says, "Our question becomes whether an agreement to pay money to these 6 trustees is a promise to pay to 'any representative of any of his employees'."

The Court: The Ryan case decides they are representatives.

Mr. Romero: I am saying, true, he gets that money; what he does with it, there is no relationship between employer [201] and employee representatives. In other words, the moment of the giving of the check given to the union, the union is not an actual person, the union can not go and take the check, somebody has to represent the union at the taking. Wadelmiro Arroyo takes the money, he is not taking it for himself, according to what the evidence shows here, it was taken for the welfare fund. His intention, what to do with those checks, suppose he takes the checks immediately and cashes them, that's his intention, the law is *malum prohibitum*, which can not bear upon the intention of the party or parties involved. It is merely the act of taking that money, and Wadelmiro Arroyo took the checks for the union. That was his act.

His intention of doing with those checks what he did later on has no bearing upon the offense charged in this case.

The Court: No, I believe that he received the money knowing that he was going to get it, that's all. It is the same as if the employer would have told him, "You take this money to Mr. So-and-So in bills," and he would have pocketed the money. And of course I want to clarify that Mr. Perez Marchand was making a play of words as to the appropriation and receipt. The definition you gave of appropriation was "receive in an illegal manner" wasn't it? That's an appropriation? That's what you said? Well, precisely that's [202] what happened. I believe I have not clarified any other way—

Mr. Perez Marchand: Did I give the definition of appropriation as receive in an illegal manner?

The Court: Yes, I have it here.

Mr. Perez Marchand: I must be very short in my Eng-

lish. Appropriation is taking possession of somebody else's property and receiving is something else different. Appropriation can not be taking in an illegal manner, but using in an illegal manner.

Mr. Rodriguez Antongiorgi: Unlawful receiving is certainly much broader than an appropriation.

The Court: If you take, you receive.

Mr. Perez Marchand: I may take a thing from here without receiving it. That's an appropriation.

The Court: Received, is a much broader term, and of course receive is a statement of a fact, to get possession of, and if you get possession of money in an illegal manner—

Mr. Perez Marchand: The very term appropriation excludes the interpretation of receiving for somebody else, so if the man is given money for a third party, and he has the mental reserve of appropriating it to himself, that is a problem between him and the person for whom the property or value is destined. It isn't a problem between the man who gave it to him and from whom he received it. He receives [203] two checks for the union—period. Now, he has in mind appropriating the checks. That's a problem between the union and the man, not between the employer and the employee.

The Court: I clarified that when I said that the purpose of the employer would be a legitimate purpose, and the purpose of the representative would be an unlawful purpose, and nevertheless what governs here in this type of crime is the intent and purpose of the representative, not his employer. If the purpose of the employer would have been illegitimate, then he would have been covered under sub-section (a). The motion for a judgment of acquittal is denied. Call the jury.

(The jury returned to the court room).

The Court: Opening statement by the defense.

Mr. Perez Marchand: Your Honor, before proceeding with the evidence for the defense, we would like to note that some of the witnesses and especially those we intended to call on first were properly excused, subject to being called.

The Court: The witnesses were excused until tomorrow morning, some of the witnesses, not all of them. You may present the witnesses you have here, and then tomorrow call the others and we will continue with the other witnesses.

Mr. Perez Marchand: We should not like to alter the order of facts and the chronology of events, and we should want the Court to entertain and allow a motion for continuance until tomorrow morning, because intending to gain time [204] we might have to use witnesses this afternoon for an hour or two hours.

The Court: Yes.

Mr. Perez Marchand: That might impede our stipulating tomorrow about the testimony of others, and in that way allow us to shorten the case very much.

The Court: Well, it is almost 3:00. You may make the opening statement. You may use one or two witnesses this afternoon and then the other witnesses tomorrow.

Mr. Perez Marchand: Would the Court allow a ten minute recess, so that we may decide what witnesses we can use this afternoon?

The Court: All right. Ladies and gentlemen of the jury, we will continue the recess for ten more minutes.

(A short recess was then taken.)

Mr. Perez Marchand: May it please the Court, ladies and gentlemen of the jury. In the case of *United States* v. *Wadelmiro Arroyo* now in progress, the defendant as you have heard and already know has been indicted for having received wilfully and unlawfully from the Puerto

Rican American Refinery, Inc., and Central Mercedita, Inc., a sum of money in the amount of $15,000 in two checks, which sum was destined to the welfare fund for the benefit of the affiliated members of the union for which the defendant negotiated with the employers.

[205] If you remember the opening statement of counsel for the Government he promised that he would prove that Wadelmiro Arroyo wilfully and unlawfully received these two checks contrary to the law of which and about which you will be in time instructed by the Court. That is, wilfully and unlawfully according to the Government's theory, Wadelmiro Arroyo received what he did not have a right to receive, and therefore in violation of the labor laws. If you remember even in a summary manner the proof, the evidence offered by the Government, you already have noticed that because of the form in which the checks were drawn, and because of the respective names of the drawer, drawee, and endorsers, that is the Refining Company and Central Mercedita as drawers, and the entity in favor of which the checks were made—Wadelmiro Arroyo does not come into the picture. In other words, he did not receive as stated in—

Mr. Rodriguez Antongiorgi: I hate to interrupt, Your Honor, but I understand the opening statement is what he is offering to prove, and counsel is just arguing the evidence of the Government now, and this isn't the proper time.

The Court: The purpose of the opening statement is simply to present your case, what you intend to prove.

Mr. Rodriguez Antongiorgi: I don't like to interrupt counsel.

The Court: Not to comment on the evidence of the Government [206] or make any argument as to that, just what you are intending to present to the jury.

Mr. Perez Marchand: I stand corrected, Your Honor.

Under this indictment as it now reads and has ever read, the defense of Wadelmiro Arroyo will be, and we expect to prove the checks were not given or delivered to Wadelmiro Arroyo. In other words, Wadelmiro Arroyo did not receive from the drawers, the checks representing the amount of money which is referred to in the indictment. We intend to and expect to prove that at the place and time when these checks were made and delivered by the employers or their representatives, the defendant Wadelmiro Arroyo, because of past experiences, refused to accept the checks directly from the employers or their representatives, and the checks were then turned over to a third person to comply with the terms of the agreement, and thus conform to the contract, the terms of the labor contract, and the purpose for which the checks were made for a union of laborers. We also intend and expect to prove by the evidence that this transaction once finished, Wadelmiro Arroyo left the premises and had only to do with the checks when in the office of the union and acting jointly with the secretary of the union the checks were endorsed and taken for deposit to the name of the union, and not to the name of the defendant.

That, insofar as the checks were concerned and their [207] destination indicated, these checks were most lawfully received by the president of the union and put, in the course of circulation, through the banks according to the banking laws and regulations. And we intend to prove, further, that Wadelmiro Arroyo the defendant not only received the checks lawfully and set them in motion in a lawful way, but that within the limitation and the orbits of his obligations as leader of the Local 1781 of the I.L.A. he did for the people and the men who were destined to receive the benefits of the checks as the bargaining contract and the welfare agreement called for.

Finally, we expect to prove to the satisfaction of the jury

that at no time was the defendant Wadelmiro Arroyo guilty of the acts, of the conduct with which he is charged by the terms of this indictment, and we sincerely hope and expect that, in justice to all concerned, you will always bear in mind that the Government's case must be in strict accordance with the terms of this indictment, or otherwise render a verdict of acquittal. Thank you, Your Honor.

* * *

[244] THIRD DAY OF TRIAL

The trial of the above entitled case was resumed at 9:30 in the morning of February 14, 1957, pursuant to the adjournment taken on the previous day.

All parties and their counsel were present as before.

Mr. Perez Marchand: Our next witness will be Juan Galib.

JUAN GALIB RIVERA

a witness called by and on behalf of the defendant, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Perez Marchand:

Q. May it please the Court, please state your full name and personal circumstances? A. Juan Galib Rivera.

Q. Are you a laborer? A. Yes, sir.

[245] Q. What relation, if any, have you with Local 1781 of Ponce? A. I am vice president.

Q. Since when? A. Since the union was founded in 1948.

Q. What position did you hold in that local during the month of February 1953? And through June, 1953? A. Vice president.

Q. What participation, if any, did you have in the negotiations for the working agreement with Central Mercedita and Puerto Rican American Refinery Corporation?

Mr. Rodriguez Antongiorgi: I can not hear the witness. A. I appeared at the bargaining with the factory.

Q. Who signed, when and where, the bargaining agreement?

Mr. Rodriguez Antongiorgi: I object. The document is in evidence and it speaks for itself.

Mr. Perez Marchand: Then I will lead the man. I must ask him if he signed the document.

The Court: You said, who signed, when and where. The document is there and it has the date and signatures. Objection sustained.

Q. Did you sign the agreement? A. Yes, sir.

Q. Do you remember of your own knowledge whether, besides the bargaining agreement, a welfare agreement was there discussed [246] and entered into? A. Yes.

Q. Was there any money passed, or things of value delivered, as a result of the welfare agreement? A. No, not at the moment that we were signing the agreement.

Q. You mean it happened some time after that? A. Yes.

Q. When, and where? A. It was afterwards, at the office of the union.

Q. Were you present when the money or things of value were delivered? A. I was present.

Q. Where was that, and when? A. That was some days after the agreement, that Armando Rivero took it over there.

Mr. Perez Marchand: Will you kindly ask him if he said "dias despues" or "el dia despues"?

Mr. Rodriguez Antongiorgi: That's very improper, Your Honor.

The Court: He said "dias despues".

Mr. Perez Marchand: I just wanted it for the record.

Mr. Rodriguez Antongiorgi: Let the record stand as it it.

Q. How did that happen? A. The employer promised that the welfare fund would work—

[247] Mr. Rodriguez Antongiorgi: It is not responsive, and he is trying to explain what the agreement was, and he isn't the man to explain that. The agreement is in evidence. I object.

The Court: What you asked is how it happened on a certain date, and he is answering about the agreement. The answer is not responsive, and it is ordered stricken.

Q. I am asking you, Mr. Galib Rivera, when and where did the things of value pass hands before you? A. Not at the question of the bargain agreement.

Q. When and where? A. It was the next day.

Q. At what place? A. Armando Rivero took it to the office of the union.

Q. Did you see Armando Rivero deliver that to anybody there? A. Yes.

Q. Please state the name and circumstances? A. To the president of the union.

Q. Who was the president on that day? A. Wadelmiro Arroyo.

Q. What did you see Rivero hand over to Arroyo? A. Two checks.

Q. Did you see the checks personally? A. I saw them in front of me, when they were being delivered.

[248] Q. You stated that you are a member of the Board of Directors of Local 1781? A. Yes, sir.

Q. Where were you on the 2nd day of March 1953, if you remember? A. At the office of the union.

Q. What happened at the office of the union that day, if you remember? A. I don't remember.

Q. Showing the witness Exhibit 8 for the Government, have you seen that document before, Mr. Witness? A. Yes, sir.

Q. Where? A. At the office of the union. My name

appears here but our signatures were placed down below. This was a longer sheet of paper. My signature does not appear here.

Q. Did you sign in the presence of any other person? A. Yes.

Q. Who signed that document with you? A. Dionisio Rivera, Luis Rivera, Antonio Figueroa, Ramon Rios, Luis Silvagnoli, and Juan Galib Rivera.

Q. You say that your signature does not appear on the document? A. It does not appear. The name appears but we signed lower down. The sheet was longer.

[249] Q. Who handled that document after you people signed it? A. The secretary.

Q. Who was the secretary then? A. Luis Silvagnol.

Q. Do you happen to know what he did with the document? A. Endorsed it and go to the bank.

Mr. Perez Marchand: No more with the witness.

Cross Examination

By Mr. Rodriguez Antongiorgi:

X-Q. Mr. Witness, you say that Mr. Silvagnoli took this document to the bank? A. Yes.

X-Q. Are you sure about that? A. Yes, sir.

The Court: You saw him take it?

A. Yes, he left the office to take it to the bank.

X-Q. Alone? A. Yes, alone.

X-Q. Wadelmiro Arroyo wasn't with him? A. I don't think so.

X-Q. You don't remember, or you don't think so? A. He left the office alone.

X-Q. But this document was in the hands of Luis Silvagnoli? A. Yes, it was delivered to Luis Silvagnoli.

X-Q. And you say, under oath, that this is the signature [250] of Luis Silvagnoli? A. No, I don't say the signature. The name is here. The signature, I—

X-Q. Whose signature is that? A. It says Luis Silvagnoli there, but—

X-Q. Do you know his signature? A. But we signed down below.

X-Q. Do you know the signature of Luis Silvagnoli? Answer the question, please? A. I know it.

X-Q. You have seen it many times? A. Yes.

X-Q. Well, can you say if that is his signature? A. Well, sometimes he would sign—

X-Q. Please answer the question. A. —this way, and others that way.

The Court: The question is, is it his signature?

A. It does not look to me like his signature.

X-Q. It does not look like the signature of Luis Silvagnoli? Now, you say that you were present when the collective bargaining agreement was signed? A. Yes.

X-Q. And was Mr. Arroyo? A. He was present.

X-Q. And who delivered the checks there? [251] A. Armando Rivero.

X-Q. Who delivered the checks to Armando Rivero? A. I don't know.

X-Q. You were there, but you don't know? A. Because at the moment of signing the agreement no checks were delivered.

X-Q. But you just told me that they delivered some checks there?

Mr. Perez Marchand: For the record, the man hasn't said such a thing.

A. It was at the office of the union. It wasn't at the other office.

The Court: All he stated was that Armando Rivero delivered the checks at the union office.

X-Q. When the collective bargaining agreement was signed at the office of the Central, were any checks delivered? A. No, not at that moment.

X-Q. At any moment, and while you were there? While you were there in the Serralles office? A. Antonsanti told the president that the checks of the welfare plan were prepared.

X-Q. But you did not see Mr. Antonsanti deliver those checks to Armando Rivero? A. I was not in the office of the employer. We left as soon as we finished.

[252] X-Q. And you are sure that Mr. Antonsanti was there? A. Yes, sir, he was there.

X-Q. Now, you know Armando Rivero well? A. Yes.

X-Q. How many years have you known him? A. About ten years.

X-Q. Is he very close to you, and to your union? A. No.

X-Q. He is not very close to the union? A. No, he is not.

X-Q. He is not close. As vice president of that union that had that welfare fund, can you tell us how active Armando Rivero was in that union? A. At that time he was an I.L.A. organizer.

X-Q. Then he was not either an officer or a member of your union? A. No.

X-Q. No, of course, as vice president of that union, you are interested in the affairs of your union, aren't you? A. Yes, I am interested.

X-Q. Now, do you have knowledge, if you know, of the fact that on April—try to remember this—if you have knowledge that on April 30, 1953, a check was given to Armando Rivero?

Mr. Perez Marchand: Objection, Your Honor.

[253] The Court: Let him finish the question, and then object.

X-Q. A check was given to Armando Rivero against the fund in the Banco de Ponce of the union, signed by the defendant here, Wadelmiro Arroyo, in the amount of $1,365.00?

Mr. Romero: Objection, Your Honor, this does not have

any bearing on the declaration of the witness in the direct.

The Court: It tries to test the credibility of the witness.

Mr. Romero: That has been the suggestion every time he brings in things that are completely irrelevant.

The Court: The witness is vice president, a person who purports to know the affairs of the union.

Mr. Romero: He has not established whether the check was on the personal account or the union account.

The Court: He said the union account.

Mr. Romero: I thought he said, signed by Wadelmiro Arroyo. Can you produce the check?

Mr. Rodriguez Antongiorgi: I have today issued a subpoena to get a photostatic copy of the check.

The Court: He can ask the question.

Mr. Perez Marchand: How can he ask the man about a thing which isn't in the hands either of the witness or in the hands of the United States Attorney?

Mr. Rodriguez Antongiorgi: If he has knowledge.

The Court: If I give a check in the amount as high as [254] $1,300, to a man whom I know, who has been associated with me as an organizer, that fact alone immediately would recall it, so that it is absolutely proper.

Mr. Perez Marchand: But the premise is that you, that is, the man personally gave the check. In this case he is being asked—

The Court: If he knows that a check was given.

Mr. Perez Marchand: That a third person gave to a fourth person.

The Court: As the vice president of the union, he must be familiar with the affairs of the union. Objection overruled.

Mr. Perez Marchand: Exception.

X-Q. Please answer the question? A. Please read the question.

(The question was read back by the Reporter.)

A. From the funds of the welfare plan?

X-Q. From the funds in the bank, of the union funds. The account that the union had in the Banco de Ponce, because those funds were mingled there with the welfare fund? A. I don't remember that.

X-Q. Are you sure that you don't remember that? A. No.

X-Q. Do you know if Armando Rivero ever received any money from the funds of the union in the Banco de Ponce? [255] A. Well, maybe on union business he may have received some, but I don't know.

X-Q. Where is Armando Rivero now? A. Here in San Juan.

X-Q. He is here? Are you a friend of the defendant here? A. Yes, sir.

X-Q. Who refreshed your testimony here? Who refreshed your memory regarding the testimony you were to give here? A. Nobody.

Mr. Rodriguez Antongiorgi: No more questions.

Mr. Perez Marchand: It might save us time with the witnesses if the United States Attorney will stipulate with me that document Exhibit 8 on which the Silvagnoli signature is being contested was subpoenaed from the Banco de Ponce by him.

Mr. Rodriguez Antongiorgi: I am sorry, Mr. Perez—

The Court: It appears from the trial that the officer from the Banco de Ponce was the one who delivered this document in this court. That it was in the bank's possession.

Mr. Rodriguez Antongiorgi: That was subpoenaed from the Banco de Ponce.

The Court: The National City Bank, it wasn't Banco de Ponce.

Mr. Rodriguez Antongiorgi: Yes, that's a National City Bank letter. No more questions.

[256] Mr. Perez Marchand: No more questions.

The Court: You are excused.

(The witness was excused.)

ORLANDO ARAGON

a witness called by and on behalf of the defendant, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Perez Marchand:

Q. Please state your name and personal circumstances, sir? A. Orlando Aragon. May I ask what is meant by personal circumstances?

Q. You are an employee, a professional, a laborer? A. I am an employee and a professional.

Q. An employee of whom? A. Of Puerto Rican American Sugar Refinery, of Central Mercedita, Inc.

Q. What position do you hold with reference to the two entities just named? A. At present, you mean?

Q. All right, at present? A. At present I am general manager.

Q. At the time of negotiating a bargaining agreement with the union, that is, on the 21st of February, 1953? A. On the 21st of February 1953, I was assistant manager.

[257] Q. Of both entities? A. Yes.

Q. What participation, if any, did you have in the negotiations for an agreement? A. I was present at some of the meetings when the agreement was being negotiated.

Q. Were you present when it was signed? A. Yes.

Q. Were you also present at the delivery of checks, Exhibits 4 and 5, in this case? That is, checks representing the payment or contribution of Central Mercedita and Puerto Rican American Refining for a welfare fund? A. May I see the checks?

Q. Yes. Handing the witness Exhibits 4 and 5 for the

Government. A. Yes, I was present when those were handed over.

Q. Who handed them over to whom? A. I handed them over to Mr. Wadelmiro Arroyo.

Q. At what place? A. At the office of Central Mercedita.

Q. You are sure you handed them to Wadelmiro Arroyo, or to Armando Rivero? A. I am sure that I handed them to Wadelmiro Arroyo.

Q. Did the checks then appear as they appear now, excepting for the marks of identification?

[258] Mr. Rodriguez Antongiorgi: Pardon, I didn't get that question? I am sorry.

Q. Did the documents appear then as they appear now, except for the marks of identification? A. By marks of identification, I presume you mean endorsements, bank notations on the check, etc.?

Q. Were they endorsed in your presence? A. No.

Q. When you delivered these to Mr. Wadelmiro Arroyo, as you said, what did he do with the checks? A. Excuse me, I want to get a clarification of the question you asked me before. By marks of identification, do you mean the endorsements, the bank punchings?

Q. No, other marks put on here in court. Exhibit numbers, etc. A. I see. Well, no. The checks did not have any endorsement. They hadn't been punched "paid" by the bank. They didn't have any of the stampings that appear on them that were placed in the process of clearing through the banking house in Ponce, and besides they also had a bottom coupon down here with a copy of this information.

Q. So the information attached was as appears on the second page of the Exhibits? A. Yes, of the voucher.

Q. In both cases? [259] A. As appears on the voucher down to the double line below which are the administration control signatures of Central Mercedita.

Q. You mean where the documents both read "concepto?" A. Yes, there is a coupon attached to the bottom of the check which is an exact replica of everything that's printed above the line where the word "distribution" appears.

The Court: That's in the middle portion of the voucher? A. Yes, in the middle portion.

Q. Who wrote that legend or explanatory note on this second page of the documents? A. That wasn't written on the second page of the documents. That was written on both the bottom part of the check and—

Q. How come this has the same legend? A. They were both prepared in the offices of these two companies which are administered jointly.

Q. And when you delivered the checks, they each had the attachment and the copy with the legend that it has there? A. No, the copy was not attached. The copy is part of the office records.

Q. Oh, it is part of the office records? A. That does not go outside our office to anyone.

Q. So, from your experience it means that with the check there had to go a statement, the same as appears in the middle [260] of the second page of each document? A. That's right. That's right.

Q. And who prepared that statement?

Mr. Rodriguez Antongiorgi: I think he has answered that already.

A. Someone in the organization. Someone in our organization, in the accounting department.

Q. Will you kindly read for the jury what each of the documents reads, on the line next to the word "concepto"? A. "Fondo de Beneficencia para el ano 1953, segun convenio firmado Febrero 21, 1953."

Q. And that was? A. That was the check of Central

Mercedita, Inc. The check of Puerto Rican American Sugar Refinery reads as follows:

"Fondo de Beneficencia para al ano 1953, segun convenio firmado en Feb. 21, 1953 $7,500.00.

Q. When you delivered these documents to Arroyo, as you have just stated,—

Mr. Romero: For the benefit of the jurors who don't understand Spanish, could we have a translation?

The Court: Do all the jurors understand Spanish? Did you understand what was read?

The Jurors: Yes.

Q. At the time when you delivered the checks with the legend that you have just read, to Wadelmiro Arroyo, did he [261] haggle or argue with you about the writing on the annex or the purpose of the checks? A. No, he didn't argue.

Q. He accepted them as per the terms stated there? A. Yes.

Mr. Perez Marchand: That's all with the witness.

Cross Examination

By Mr. Rodriguez Antongiorgi:

X-Q. Only one question. Mr. Aragon, at the time of delivery of these checks, as you testified from you to the defendant in this case, Wadelmiro Arroyo, was this distinguished attorney present there? A. No, he was not.

Mr. Rodriguez Antongiorgi: Thank you. I was referring to Mr. Orlando Antonsanti. No more questions.

(The witness was excused.)

Mr. Aragon: As I excused to go back to Ponce?

The Court: Unless you need Mr. Aragon?

Mr. Perez Marchand: I don't think we do.

The Court: Then you are excused.

Mr. Romero: Can we stipulate the fact that we have tried to subpoena Armando Rivero?

Mr. Rodriguez Antongiorgi: I won't stipulate that. I would like to have Armando Rivero.

Mr. Romero: Then we will have to call Marshal Alonso to the stand.

[262] Mr. Rodriguez Antongiorgi: What would you like to stipulate, then?

Mr. Romero: That the subpoena was issued.

Mr. Rodriguez Antongiorgi: I haven't seen it. If it is a matter of record I will stipulate.

Mr. Perez Marchand: We want to appear in the record as having done what we had to do.

Mr. Rodriguez Antongiorgi: If there is a record of a subpoena issued to Armando Rivero, that's all I would stipulate. I would stipulate that because it is a matter of record.

The Court: The subpoena, and the return by the person—

Mr. Rodriguez Antongiorgi: Yes, what appears of record I would stipulate. That's all right.

The Court: You may see this. You may stipulate if you want to, and it will be admitted.

Mr. Rodriguez Antongiorgi: I will stipulate what appears here. I don't know what addresses were given for Armando Rivero. It should also be stipulated that the Marshal goes only to the address as given by the party requesting the witness.

The Court: Yes, it does not appear whether he was living at that time at that address.

Mr. Rodriguez Antongiorgi: The only thing the document says, he couldn't find him at an address given by the party issuing the subpoena.

[263] The Court: If you want to, offer them in evidence.

Mr. Rodriguez Antongiorgi: They speak for themselves, but I won't stipulate anything else.

Mr. Perez Marchand: We offer the document in evidence to—

Mr. Rodriguez Antongiorgi: For what it says.

The Court: That's all right. So it is marked Exhibit 1 for the defendant. He has no objections.

[The subpoena issued for Armando Rivero and return by the Deputy Marshal was marked Exhibit 1 for the defendant, having been admitted in evidence.]

Mr. Perez Marchand: The purpose is to show that—

Mr. Rodriguez Anfongiorgi: The purpose is what the Exhibit shows.

The Court: You may read it to the jury if you want to.

Mr. Perez Marchand: I would rather have the document read to the jury. Ladies and gentlemen of the jury, this Exhibit 1 for the defendant shows that on February 5, 1957, prior to the trial of this case, the Marshal of this Court was handed a subpoena for Armando Rivero Chavez, then known to live at Calle Covadonga No. 50, San Juan, Puerto Rico. And attached to the subpoena is the document officially signed by Santos Buxo, Jr., United States Marshal, by his Deputy, Nepomuceno Mas, reading that he certifies and returns that on the 8th day of February he received this subpoena [264] and that after diligent search has been unable to find the within-named defendant's witness Armando Rivero Chavez, within his district. That the proper fees were tendered to him for his services, and the fees returned to the defendant's counsel because the man could not be located.

Mr. Rodriguez Antongiorgi: All right.

Mr. Perez Marchand: May it please the Court, I shall ask for a fifteen minute recess to confer with the defendant and members of his defense to decide whether we shall use any other witnesses or rest the case.

* * *

[265] Mr. Perez Marchand: May it please the Court.

The defendant wishes to appear on the record as reproducing now his previous motion for judgment of acquittal on the grounds stated, and further submits and now further prays for a judgment of acquittal based on the following facts and law.

As has already been stated from the bench, the indictment or accusation in this case offers the novelty of being expressed in negative terms, that is, it makes direct reference to each of the particulars contained in the exceptions expressed in sub-section (c) of Section 186, Title 29, U. S. Code, or Section 302 of the National Labor Management [266] Relations Act. So in order to encompass and weigh the evidence produced the Government against the defendant, we have first to take notice of the well-known fact that by section (b), or sub-section (b) of Section 186, United States Code, the alleged crime is committed when the representative of any employees receives or agrees to receive or accept any money or thing of value which is not destined to one of the exceptions contained in sub-section (c) of Section 186.

In different words, an "A contrario senso" the crime is not committed when the thing of value or money is received for one of the items contained in sub-section (c) or Article 186. So, with that in view and reading the pertinent part of the indictment we now have that the Government alleges that "on or about February 24, 1953, at Ponce, Puerto Rico, Wadelmiro Arroyo did wilfully and unlawfully receive from the Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., a sum of money in the amount of $15,000, which sum was not received as payment to a trust fund established by the defendant or any other representative of such employees for the sole and exclusive benefit of the employees of said employers, and their families and dependents."

We have omitted, of course, for the argument the parts

of the exceptions contained in sub-section (c) of Article 186, because they are absolutely immaterial to the [267] issue before this Court. The issue before this Court is that on February 24, 1953, Wadelmiro Arroyo received the sum of $15,000 for purpose outside of the exceptions of (c) of Article 186. It does not take much analysis to realize that from the very start, and ever since the Government produced by order if this Court the particulars requested by the defendant, the District Attorney, upon being asked to explain and detail how and in what manner the amount of $15,000 was given to the defendant, the defendant was informed officially through the particulares submitted by the Government that such sum was delivered to him and by him received; as a matter of fact, the point "delivered" is not essential to the case. Who delivers, how he delivers, when he delivers, the gist, the very essense is the defendant "received", so the question is—did he receive? And the allegation is that he received unlawfully in two checks, each for $7,500, a sum of money which in the words of the indictment, I quote, "was not received as a payment to a trust fund established by the defendant or any other representative of such employees for the sole and exclusive benefit of the employees, etc."

It so happens that the Government itself, not the defendant, has produced the evidence to discredit the indictment, and to show that the exception contained in paragraph (c) (5) of Article 186 of the Penal Code has been fully [268] complied with. In other words, that no crime is committed and in this case no crime has been committed when the contribution made by the employer is ear-marked for one specific and legal and legitimate purpose as stated in sub-section (c) of Article 186.

The checks, as finally identified and referred to by the witness Orlando Aragon were delivered to and received by the defendant with an attachment that read exactly as

appears from Exhibits 4 and 5, the second page of each Exhibit to the effect that the reason for the delivery and the concept for which these checks are received by the defendant is to make payment into the welfare fund of Local 1781, Union de Trabajadores de Factoria, Refineria y Ramas Anexas de la Industria Azucarera, and I quote "for the year of 1953 under the terms of the bargaining agreement signed February 21, 1953,"—unquote.

So we respectfully ask the Court, what could be, if any, the defense of Wadelmiro Arroyo under the terms of this indictment if the Government had not produced those checks and the Court did not have before it, to have the jury examine the evidence that sub-section (c) of Article 186, number (5), was not complied with? Wadelmiro Arroyo, by his counsel, would have had to subpoena the factory management and even our distinguished colleague, lawyer and adviser for the employers concerned, to show what? To show that those [269] checks were delivered—made, delivered and received for one purpose. To comply with the terms of the bargaining agreement and to sustain the welfare fund created by that agreement.

The Government in producing these documents not only has proven the case for the defense, in that it has shown that the only destiny for which these checks were drawn, the very purpose for which they were received, was complied with by the defendant.

At the same time it shows, I mean the evidence offered by the Government clearly shows that it is the Government itself that has discredited the indictment, because having alleged that on the 24th of February 1953, Wadelmiro Arroyo received $15,000 from the employees—oh, employers, beg your pardon—which sum of money was not received as payment for a fund, instead of bringing before the Court and jury evidence to show that the moneys received or the checks received by Wadelmiro Arroyo were

not received as payment for a trust fund by doing it contrary, that is by acting contrariwise, and against the letter of the indictment, the Government has incurred in such grievious and fatal variance that under the well-known rules of procedure and according to these cases that deal with the manner of proving a charge or an allegation, we think, we hold and we submit that this case must not go to the jury.

[270] The question now before the Court is not only so technical as to bar the fury from entertaining it, but it is also so fundamental with respect to the right of the defendant to see the Government prove its case according to its allegations that if this novelty now intended by this very first case in the history of labor legislation and labor relations encompassed by the Labor Relations and Management Law would become a freak in the history of labor legislation and its jurisprudence.

The United States Attorney charged the man with having violated one article of the Penal Code which reads verbatim that he has the only one way of excusing himself and avoiding the charge, and that is by showing that he has done something which is contained in the 5 exceptions expressed by sub-section (c) of Article 186 of the Penal Code. And what happens? If is the Government who wants the jury to convict this man because he says he received $15,000 and he did not receive this $15,000 as payment to a trust fund established by the defendant or any other representative of the employees. And the only evidence, outside of the objected evidence on embezzlement which puts the case clearly outside of this Court, the only evidence under Article 186, Your Honor, upon reading the letter of the indictment to which the Government by its District Attorney is bound inescapably is what the checks read, what the checks say, what the witnesses for [271] the Government have stated that they were received by

Wadelmiro Arroyo as payment for a trust fund created under the terms of the bargaining agreement signed on the 21st day of February 1953; so in order not to bore your mind with repetitious arguments, Your Honor, we close stating once more for the record: First, that the Government has failed because it has varied and changed by its manner of proof the very letter of its indictment against defendant, and that variance is fatal, and the basis for an acquittal of the defendant. Second, that the reason the defendant does not offer evidence and will not offer evidence in his defense is because the Government itself has supplied, offered, introduced . . .

The Court: But you have offered evidence. You can not say that you have not offered evidence. You have offered the testimony of five witnesses.

Mr. Perez Marchand: Yes, Your Honor, we have offered evidence to enhance the evidence of the Government in that respect. When Mr. Aragon states, and he is the star witness for the defendant with reference to the purpose of delivery and receipt of the moneys alleged. He asked about the purpose of the delivery, the manner of delivery the attitude and manner of the defendant, and when asked specifically if there was any haggling or any objection manifested or submitted in his presence by the defendant with regard to the purpose for which the two checks are given to him, he says [272] "None at all". In other words, that taken in conjunction with the evidence submitted by the Government shows only one thing, that the two documents were in compliance by the employer and the employees, represented by the defendant, of the legal, lawful manner of compliance.

When witness Pedro Goyco who is the Labor Relations Officer of Central Mercedita and Puerto Rican American Refining Company testified for the Government he said that it was Orlando Aragon who, acting for the employer

delivered to Wadelmiro Arroyo, and Wadelmiro Arroyo received from Aragon the checks for the purpose stated on the checks. That purpose is exactly the exception and the bar to a charge for violation of Article 186. It is the one that reads that the provisions of this section, that is the Penal provisions of Section 186, shall not be applicable with respect to money or other thing of value paid to a trust fund established by such representative, etc.

Now, under the *Ryan* case it is well known to Your Honor that great emphasis is placed on the fact that once the question of who is the representative has been disposed of, the next question is, were the moneys of the things of value given to and received by the representative for the exception contained in paragraph (c) number (5) of sub-section (c).

The Court: Nothing about that was involved in the *Ryan* case.

[273] Mr. Perez Marchand: It was not involved and the Honorable Court may consider this a reference to a *dictum*, but there is in the analysis and the history of the case by Justice Clark a statement to the effect that it is only the exceptions contained in sub-section (c) that can give the defendant a leeway and a defense.

In other words, if the defendant can prove that he received, not for himself but for the trust fund, he is beyond prosecution. We hold that in this case it is the Government by its own evidence that places Wadelmiro Arroyo beyond the pale of criminal conduct under Article 186, because it should have known, the Government, when this indictment was drawn, that to prove anything to the contrary of this letter would be to take the time and the money of all concerned to prove only one thing, that the defendant has been brought into court merely to show compliance with the law. And we don't say that by way of censure, we say that because we feel ourselves duty bound in claim-

ing the constitutional rights of the citizen charged with a violation of a penal statute to put all the emphasis we can on facts which show that he is not guilty as charged.

Mr. Rodriguez Antongiorgi: May it please the Court, Your Honor, in answering Mr. Perez Marchand's argument, of course I will start from where we left yesterday, and I will invoke the ruling of the Court on the motion that we heard yesterday, [274] in which Your Honor decided after making a fine review of the evidence presented by the Government that there was a question of fact to be determined by the jury, as to whether or not the defendant received this money through orders for payment made by the employers in violation of the Act.

Now, after having heard defense, — I say, Your Honor, that that is even more so, has been fortified and strengthened that there is a question of fact and I will point out why.

First, Mr. Perez Marchand announces to the jury that he will prove, apparently under the theory that the act of physical delivery was material to this case, that Wadelmiro Arroyo in the Serralles office did not physically receive this money, and that he made some protestations there and left, and Armando Rivero was the one who received the checks and gave him some advice. Now, the evidence of the defendant comes in, and the first three witnesses stick to their story and say that the delivery of the checks was made by Mr. Aragon to Mr. Antonsanti to Mr. Armando Rivero, that the defendant said, "I have nothing to do with this, this may be in violation of the law, so we are all going out," so they all move over to the union and later Armando Rivero comes over with the checks and it is at that time, according to those three witnesses, that the defendant goes through the way we have already established, to the bank [275] and opens an account and

starts with his own control of the account and starts to withdraw from that account.

But what happens? That the defendant himself brings another witness and establishes with two witnesses two important things on the question of fact to go to the jury. One, Mr. Aragon himself, and Mr. Aragon says, "No, that is not so. I delivered the checks to Mr. Arroyo and Mr. Antonsanti wasn't there." Then another point established by another witness for the defense, the witness before Mr. Aragon, I forget his name . . .

The Court: Galib.

Mr. Rodriguez Antongiorgi: Galib, he takes this letter to the National City Bank and he says he is the vice president of the union, and that he knows the signature of Silvagnoli, and it does not look like his signature, the one that appears there. What does that come up for? As a question of fact to be determined by the jury. All this evidence, the defendant's evidence coupled with the Government's evidence points out whether this jury is justified and has the right to determine as a question of fact and make inferences from that evidence, whether when Wadelmiro Arroyo, even when he negotiated the contract and when he received those payments, either through Rivero or directly from Aragon, whether he already had the state of mind of receiving the illegal payment, and all . . .

[276] Mr. Perez Marchand: Mr. Rodriguez—

Mr. Rodriguez Antongiorgi: Please let me finish, Mr. Perez Marchand, I didn't interrupt you, excuse me, sir.

And all these documents where they put a lot of stress shows that up to that point the employer, of course, was just merely complying with the law by making these notations on this, because otherwise the employer would be violating the law also. That does not mean that from that point on the representative of the employees is not subject to

violating the law, because we know that either the representative of the employees or the employer may be subject to violation of the law, and there has been a lot of stress put by the defense here on the word "receipt", "received" the money, but now there is another point, your Honor.

I will make this argument under the law of negotiable instruments, under commercial law. I say these documents are orders for payment, that's all. What they call a bill, a negotiable bill. Either through Rivero or directly the receipt of that money is made by Arroyo when he, through this forged document according to evidence presented, and through other means proved, goes to the bank, deposits the money, and draws from that account.

Under commercial law, that's where you have the receipt of money, because all that they have in their hands until they deposited the checks and start drawing is an order [277] of payment by the employer in compliance with the Act.

If we are going to say that no matter what Arroyo had in mind through all his working, his dealings, because the checks are made to the union, the way they had to be made by the employer, there was complete immunity from violation of the Act, then really, Your Honor, I submit there would be a complete frustration of the intent of Congress and the express wording of the Act. It seems to me that if at this time there is even more reason, because of the contradictory evidence presented by the defense, to submit the question of fact to the jury under the instrustions that may be given by the Court. I can see no other explanation or legal solution to that problem that has been stressed so much about the receipt. Under any of these theories, Your Honor, under any of the interpretations of the Act that Your Honor may give, and certainly there is abundant evidence here that has to go to the jury to determine whether this money was received

by him, through all the evidence presented; and not for the sole and exclusive purpose provided by the exception under Section 186. And that's my argument to Your Honor.

The Court: You have five minutes to reply.

Mr. Perez Marchand: In the first place, Your Honor, in reply I most earnestly oppose that the state of mind of the defendant has anything to do with the case at bar. In the [278] Ryan case, it is specifically decided that as the statute reads the criminal provision therein contained is a *malum prohibitum*, and therefore has nothing to do with the *mens rea*, which is essential to a criminal charge under a general provision of criminal conduct.

The Court: But don't you think that it is still stronger as to *malum prohibitum?*

Mr. Rodriguez Antongiorgi: Still stronger.

The Court: The position of the defendant is still weaker than if it were *malum per se*, because if it were *malum per se* the Government would be obliged to prove intention, but in *malum prohibitum* it is the mere fact of his signature, period.

Mr. Perez Marchand: Period, yes. And we say that under Article 186 of the United States Penal Code which, contrary to other penal provisions contains these very exceptions, this statute by providing further that the defense can only consist of having received for purposes outside of division (5), that is, for personal enrichment, that is not for the jury because it is covered by the National Labor Management Relations Act. We hold that when the indictment specifically charges that the man did not receive the money for what the exception reads, and the Government comes forward and by its documentary evidence only proves that the man did receive the moneys or the thing of value for the purposes contained [279] in division (5) of sub-section (c), we dare say at the begin-

ning of this argument that such contention, if brought to the jury for decision, would only result in a freak.

It can not be held logically, juridically, conscientiously under the terms of the statute. This very case, the *Ryan case*, specifically holds that according to the legislative history of the statute, what Congress had in mind, what must be worked for in prosecution under Article 186, is; and I read from headnote number 3: "The Hartley Bill forbids employer contributions to union welfare funds and makes it an unfair labor practice to give favors"—give favors, "to persons in a position of trust in a labor organization." In other words, this is a statute against bribery. That's why we hold and held at the beginning of this case, upon submitting our previous motion for acquittal, that what is prosecuted and must be prosecuted is the bribing by the employer of the representative of the employees to upset the equality of relations between labor and capital. And that this, being a charge under a labor and capital relations statute, when the charge is that the defendant did not receive the moneys or the values as payment to a trust fund established by the defendant or any other representative of the employees, the proof of the Government itself, that that was just what happened.

The Court: You have already covered that in the main argument.

[280] Mr. Perez Marchand: We contend, Your Honor, that it excludes all questions pertaining to the state of mind or the *mens rea*. That is our argument. We submit the question.

Mr. Rodriguez Antongiorgi: I agree. I have said many times—

The Court: That's all right. I believe that as I said when I denied the motion, the original motion for acquittal after all the Government's evidence was in, that this is a question of fact entirely within the province of the jury,

and that if I then did not feel inclined to withdraw, and I thought, and it was my opinion that I had no power whatsoever to withdraw the case from the jury—still less can I withdraw it from the jury now.

I believe that there has been much speculation here about words and this is a matter to be considered in a realistic way. The purpose of the statute is, first, to prevent imposition by an employer through gifts or other favors to the representative of the laborers, and indirectvly dominate the unions in that form. Another purpose of the statute is to prevent labor leaders who act as representatives of the unions from milking the employer through benefits and favors exacted or extorted in some way, to be more elastic in bargaining agreements between management and labor.

Still another purpose, and I believe that is the actual purpose involved here, is to avoid that the laborers [281] and employees be defrauded in their rights, because of benefits received by the leaders, even without any knowledge or combination with the employer, which will make these leaders in a certain way and for personal purposes and for personal gain more ready and willing not to press the rights of the laborers in collective bargaining, because they know that if they press too much then they will be unable to get special favors.

The terms "delivers" and "receives" are not used jointly in the statute. This is not a statute where the provision is any employer who delivers and any labor representative who receives, etc. There are two different crimes in this statute. Under paragraph (a), the employer who delivers with knowledge that the moneys are not going to be used for any of the except purposes is criminally liable. In that situation the representative may be also criminally liable, but there may be situations in which the employer delivers in good faith or intends to deliver in good faith

money or other thing of value for a legitimate purpose under the exceptions of the Act, and the labor representative doesn't receive that money or thing of value for that purpose. But he receives it for his own personal gain, and that's the precise situation presented in this case.

Several examples would serve besides this one. One of the exceptions is that a payment by reason of services [282] rendered by the representative as an employee of the employer; that's excepted. Now, it may happen that the labor representative may send somebody else to work and use his name, and the labor representative would be receiving the payments for services he has not rendered. Now, the employer would be delivering the money for services the employer, in good faith, believes have been rendered by the employee, using a fake name. Nevertheless, the labor representative would be liable because he knew that he was not rendering the services, and that he was receiving the favor not excepted by the Act.

The same way, another of the exceptions is sale or purchase of an article or commodity at the prevailing market price in the regular course of business. A labor representative may boast that he has a regular business, say, of selling typewriters or printed matter or something that the employer needs, and he goes ahead and sells that property, which he knows that does not belong to him but belongs to someone else, pretending that it is his, and in that case the employer would not be liable because the employer would be paying in good faith for property that he thought belonged to the labor representative, nevertheless the labor representative would be liable because he knew that he wasn't selling any property of his to the employer, and that was a fraudulent transactions.

In this particular case there has been a play of [283] words very ably made by Mr. Perez Marchand. He says, "Well, when the labor representative received anything

of value not destined for one of the lawful purposes, but the destination here is not one fund, the destination must be two funds. The employer may have in good faith destined the fund for a lawful purpose, but the defendant here, the labor representative, may not have been receiving the fund for that lawful purpose, and then he would be liable because then if it would be permitted that a situation just as this would be lawful, then the intention of Congress would be frustrated. It would be very easy to simulate situations, simply by making a check or by saying something, "Well, this is for this purpose", not only in cases like this but also in cases where there is a combination between the employer and the employee. They may say, "all right, I am going to give you $40,000. I will say that this is for a welfare fund, and then I will shut my eyes and forget about what you do with the money". And precisely that's what Congress wanted to avoid with a statute of this nature. It did not have the intention of creating a crime of bribery, which now exists in the statutes. If it had been the intention of Congress to only cover bribery, this section would have been unnecessary.

The term "delivery" is to take possession of—I mean, to "receive" is to take possession of. That's the definition it has in the dictionary, and this defendant took [284] possession of. In fact, under the evidence the union never had control of the fund. It was at all times under the exclusive control of the defendant, as per defendant's own evidence. Moreover, if the defendant wanted to explain and give a semblance of lawfulness to this machination in the effect of the intent of the employer not shared by the defendant, some evidence would have been presented here that some, and this the most minor, welfare benefits were ever received by any of the employees sought to be benefited by this fund.

We have had several employees here. None of them has

testified having received any benefit. Those who admitted to have received checks said they received checks as employees for services performed for the union, and of course as the United States Attorney very well said, the evidence of the defendant, some of it, has tended to refute the same arguments made here by his attorney on this point. The fact that the checks showed the intention that the employer had in giving the checks appeared from the checks and the vouchers accompanying them, Exhibits 4, 4-A, 4-B, and 5 and 5-A. Mr. Aragon's testimony was unnecessary. It did not add anything to what existed in the Government's evidence, so it did not refute anything. But the defendant offered evidence to the effect that he had no participation whatsoever, he did not want to take those checks, as though the checks were hot goods. Oh, no. One of the witnesses says he left as soon as he [285] signed the agreement. He left, he did not want to have anything to do with the checks, because he did not agree with them.

Now, it means precisely a repudiation of the purpose stated in the checks, without wanting those checks to show that it is for a welfare fund, and that added to the evidence of the Government in the sense that right from the beginning before the conversation the defendant had the intention of getting full control of that money. He did not want the employer to do anything, nor any representative of the employer, not even a signature of any other officer of the union. Only his own signature, because he wanted to have the check book in his pocket wherever he went, in the island, to use the funds as he saw fit. And only after Armando—that's the evidence of the defendant, only after Armando Rivero convinced him that he should take the checks and they had a conversation, nobody knows what the conversation is because there is nothing here, it was that the defendant took the checks. They were immediately endorsed by him and by the secretary of the union.

Then this letter to the National City Bank, speaking about a Resolution authorizing him to be the only authorized signature to draw on those funds. This was simultaneously presented to the bank. So this paper which is only an order of payment which has not materialized in money or something else of value, when it materializes in [286] money or something else of value it is under the absolute and exclusive control of the defendant. So that's the time when the defendant is receiving money or something of value, he gets control of that fund. When somebody kicks that he has not performed the welfare fund agreement, because the signature of the representative of the employer is needed to withdraw the funds, he immediately withdraws that, closes the account in the National City Bank, and takes the balance of over $9,000 to the Banco de Ponce, deposits it in the general account of the Banco de Ponce, no mention whatsoever of a welfare fund, mingles it with other funds, and subject to be withdrawn by his own signature, and by nobody else's.

That's the evidence the jury will have before it, and that's the evidence that the jury has to weigh. I would be usurping the province of the jury if I withdrew the case from the jury, and the motion is denied.

Mr. Perez Marchand: We very respectfully request that the Court pass upon and decide the question of variance in the indictment. We have made a very specific point in the motion of acquittal, that under the terms of the indictment and according to the evidence of the Government there has been a fatal variance which entitles the defendant to an acquittal.

The Court: The indictment must be interpreted in the light of realism. The indictment is not merely alleging words, it is alleging facts and the indictment, the allegations of the [287] indictment have been supported by a sufficient evidence to go to the jury. The reconsideration

is denied. Do the parties have any requests for special charges?

Mr. Perez Marchand: We should wish to have until the Court convenes again for preparation.

* * *

The Court: We will take defendant's requests number 1 and 2.

[288] Mr. Rodriguez Antongiorgi: I object to that instruction, when you read it in conjunction with a request for instruction number 2, because I believe it gives a wrong and misleading interpretation of the law as Your Honor interpreted it, that it gives the impression that the mere delivery of the checks in the name of the union may be a defense that would be encompassed by the crime, which I believe isn't correct. I have prepared another instruction on that point which I believe gives the correct law.

Mr. Perez Marchand: Your Honor, since the statements and rulings of the Judge have shown throughout that it is the purpose of the Court to let the jury weigh and balance the evidence for and against the defendant, to do equal justice to the Government and to the individual, we submit that it would not be prejudicial to the Government to state to the jury that a question that hangs from the very thin thread of the interpretation of the attitude of the defendant should be considered very carefully. That's all. That's all we ask.

The Court: The only thing I see in these two requests is that it is confusing the issues, and what was evidently the purpose of the statute. The checks properly do not play any part. The checks are merely an instrument, an order for the payment of money. What is important here under the statute as I construe it is the actual receipt of the money or other thing of value, not the provisional receipt of a paper or [289] papers which may or may not

become money or other thing of value. The delivery and receipt of the checks themselves, if not cash, would not have constituted a delivery or receipt of money or another thing of value. If this thing had been lost or destroyed and never placed at the disposition of any person, then nobody could be charged with the offense. Because he did not receive money or anything of value, so I will deny special charge number 1, requested by the defendant, and special charge number 2 requested by the defendant.

Mr. Rodriguez Antongiorgi: I don't remember number 3.

The Court: It says, "If you find that the evidence submitted for and against the defendant bears out the indictment and proves the defendant violated the specific charge that he did not receive the checks as a payment for a trust fund established by the defendant or any other representative for the sole purpose and exclusive benefit of the employees, the jury must bring a verdict of guilty as charged."

Mr. Rodriguez Antongiorgi: I believe this is confusing for the same reason, again, because it still stresses—

The Court: Still stresses the checks. Anyway, I have a general charge that covers that.

Mr. Romero: Your Honor, you are looking only into the fact of the indictment, and forgetting about the bill of particulars submitted by the United States Attorney in which he said that the defendant received two checks to the order [290] of Union de Trabajadores de Factoria, Refineria y Ramas Anexas, well the fact that defendant deposits those checks as so written out to the Union de Trabajadores de Factoria, Refineria y Ramas Anexas, deposits it in a bank for the welfare fund as was established by the Government's own witness from the National City Bank, then we are trying to say that the union did receive that money, and it was there in an account for the union.

of the welfare fund. The fact that Wadelmiro Arroyo is president of the union and because he is president then he was given power to draw moneys from said account, does not obviate the fact that that money was first received and deposited to the union's name.

The Court: Yes, but the statute, what it contemplates is that the money be received, be delivered and received for the purpose of establishing a welfare fund under all the requirements of the section. Now, if the checks are received and deposited without complying with the provisions of the section, that is, appointing trustees, one representing the employers, one representing the employees, and a third as previously, and complying with all the requirements of that, then it could be said that the fund was established and thereafter if anything happened then the situation would be different. Now, of course, as about that, this charge is asked in a certain way, following the arguments of counsel as to embezzlement. I should say that the fact that the defendant [291] may have embezzled moneys does not in anyway preclude the application of this section.

Mr. Rodriguez Antongiorgi: That's the right law.

The Court: And that would be for the Court, to permit a defendant who is guilty of a crime to shield behind another crime and then the purpose of Congress would be frustrated. In the examples I gave this morning, suppose the employer is charged because he delivered money for a representative not for any of these purposes, and the employer comes in and says, "Well, I was extorted by the representative. I did not give this voluntarily." So then the defendant, if I follow your theory, the defendant would come in and say, "Well, that's a crime of extortion, that's not a violation." Suppose that another indictment is brought against both the employer and the representative because they conspire between themselves to cheat the

union, to cheat the employees, to defraud the employer. That is, one of the agents of the employer did that. Then they could come in and say as a defense, "Well, this is a crime of conspiracy. This is not the crime." Suppose that the representative would frame up a sort of employment, say that he was working for the employer and that this payment is to pay for his services. If he is charged or both are charged they could come in and say, "Well this is obtaining money under false pretenses, this is not the crime", and then of course the intention of Congress would [292] be frustrated. What Congress wanted in this section must be read in the light of the Labor Management Relations Act, that is, the Taft-Hartley Act. The purpose of it was that the laborers and employers, that is, labor and management would be at arms' length to freely bargain in collective bargaining. And that none of them would have something, some ulterior motive, some other hidden purpose or hidden favor not to press their rights.

Suppose a threat of strike or doing this or doing that would place management in a position which would be very weak in collective bargaining. Giving favors to the representatives would fortify that. In order to get those personal favors their position in bargaining for the rights of the laborers would be much weaker than if they had not the expectation of getting something for themselves.

Another of the reasons is that as you see the statute, and I am going to charge the jury on that, this welfare fund is established for the benefit of all the employees, unionized or non-unionized, even those who do not belong to a special union, as foremen, etc., that are not attached to a particular craft. All of them are entitled to the benefits of the fund. Now, if the administration of the fund, if the fund is left in the hands of one man, acting for the union, that man may drive those non-unionized workers from some rights under the fund, and thus extort them.

compel them to unionize [293] in order to get the benefits of the fund. It would permit foremen also to yield to improper pretensions of the union by withholding from them the benefits of the fund, so that's the purposes, and if the president of the union is the man who handles all that money and everything, then the purpose of the Act would be frustrated.

Mr. Romero: We lose track, I think, sometimes of the fact that Wadelmiro Arroyo is not the same legal person as the union. I mean—

The Court: No, but he is the representative.

Mr. Romero: Of course, he is the representative of the employees. But we are losing track of the fact that the union and Wadelmiro Arroyo are two distinct legal persons. The thing, as to one of the issues, one of the main issues, is whether it was the union or Wadelmiro Arroyo as an individual which is the way he is charged in the offense in the indictment, that he did receive the money or other thing of value.

The Court: And here, under the evidence, the Court is authorized to assume and the jury would be authorized to assume that the corporate fiction must be disregarded. That is, that the union was Wadelmiro Arroyo, because he had complete control; he engineered everything, even before the fund was established; he engineered everything to get control of everything, and there is the evidence that he told these people, "Well, I don't want anybody to have to sign anything." [294] So not only did he prevent the employers from having their representative in the fund as required by the statute, but he even engineered the thing so that nobody else would have anything to do, in the union, with the fund.

Mr. Herrera: Your Honor, but when he said, according to the evidence, that "I don't want anybody else to deal with these funds," that was after the money had been

deposited in the bank, and afterwards that's the embezzlement.

The Court: No, no, you look at this evidence. It is that he took the checks to a meeting of the union, to show them, "Here is the money." Then he told the union, "I must have complete control of these funds. I want to have a check book in my pocket so that if I have to draw on these funds I wouldn't have to go chasing anybody, and I can get the money." So he got that authorization, be it false or be it true, from the union saying that the only authorized signature was Arroyo. He got the endorsement of the secretary on the checks, and then went to the bank with the checks duly endorsed, with the letter of authorization, opened the account, and that is the moment when the checks become money delivered to him. When the money is at his disposition, and at that time the money came absolutely to his own disposition and control, and to nobody else's; from then on he drew on the account at the National City Bank. When there was some protest by the employer, the National City Bank told him, "We [295] don't want anything more to do with this. Here's a manager's check for the balance."

He gets the manager's check; goes to the Banco de Ponce and deposits it in an account of the union under which he is the only person authorized to draw, mixes it with the funds of the union, does not even say welfare fund or anything, and continues drawing on that account so that from the moment the checks were converted into the money or something of value, he has the control of it. So that I can not confuse the jury by speaking about checks. The checks meant nothing.

Mr. Rodriguez Antongiorgi: Your Honor, with respect to what Your Honor has said, I would like to mention that in request number 1 of my requested charges, I think I made a mistake, and I think Your Honor has clarified it.

"I charge you that under the provisions of Section 186 (a), (b), (c) and (d), a 'representative' of a Labor Union within the meaning of the Act, —" It should be, "I charge you that under the provisions of Section 186 (a), (b), (c) and (d), a 'representative' of the employees of the employer within the meaning of the Act, may be prosecuted irrespective of the fact that neither the Union nor the employer is prosecuted. *United States* v. *Ryan*, 350 page 299."

And that's my mistake, and I would like to correct it. [296] The Court: Correct it in your own handwriting. I don't want to be charged that I made the correction.

Mr. Perez Marchand: For the record, Judge, and before we consider the next request, may we understand that the Court considers that the defendant did not receive from the employers the moneys or things of value until the deposit was made in the bank?

The Court: Until the money was placed at his disposition in the bank.

Mr. Perez Marchand: And may we also understand as a consequence of the above that the checks are not considered things of value received by the defendant?

The Court: Checks, until they are honored, until they are honored and accepted at the bank, must not be considered to be things of value.

Mr. Perez Marchand: What I want to ask the Court is to tell me if—suppose that under the assumption that a check is not money until deposited or cashed, a check in the circumstances of this case is not a thing of value?

Mr. Rodriguez Antongiorgi: I would say that is playing with words again. It is an order for payment.

Mr. Perez Marchand: No, it is because Article 186, section (b) says in the alternative that a man representing the employees must receive or agree to receive money or things of value. Are we to understand that this man re-

ceived nothing when he was handed the checks, and that the checks drawn in [297] favor of the union were not things of value, that the defendant received?

The Court: The checks become things of value when accepted. So much so, that if, as I said before, if somebody had stolen the checks or if some other officer of the union would have grabbed the checks and destroyed them—

Mr. Rodriguez Antongiorgi: Or they would have stopped payment.

The Court: Or the employer would have stopped the payment of the checks, or the bank would have said, "Oh, no, these checks have a voucher providing for this. Unless you show it to me that there is a trust and the persons authorized to sign as trustees have been designated and their signatures registered I will not make any payments on these checks, I will not cash these checks." Then the checks are not things of value because they are worth nothing.

Mr. Perez Marchand: Just for the record, I also wish to point out a further idea. It does not appear from the evidence that the bank at any time protected the employer or advised the employer that checks that were drawn for a specific purpose had been deposited in the general account of the union. Doesn't it follow from the correspondence which is in evidence that when the bank began to consider that the defendant was acting outside of the terms of the welfare agreement the employers were thereby signifying their own implicit responsibility for not having protected themselves, [298] by requesting the bank not to accept these checks for any other account than the welfare fund?

The Court: But that does not mean anything. If that had happened, well, then we would not be here. But that did not happen. That didn't happen. There is evidence to the effect that the defendant contrived to get this money

out, and he was successful, so that even if the employer was to blame it would have meant that possibly the employer should have been charged. But that does not in any way benefit the defendant. I am going to deny also special charges 3 and 4. Of course, the Court will charge in its general charges in an explanation of the statute in this precise question. The only thing is these charges are couched in a language which attaches too much importance to the checks, whereas it is the Court's opinion that the vital factor is not the checks. The vital factor is the actual money received.

Charge number 5 I will not give because that's bringing in the embezzlement feature of the case. I am not going to charge on embezzlement because I don't believe that the defendant has any right to hide himself behind the shield of any other crime.

Number 6 is also couched in the words of the checks. Of course, I will give an alternative charge as to this, but worded in the way that I construe the statute about the actual payment.

[299] Mr. Perez Marchand: For the record, the 6th request—

The Court: Yes, I deny all the special charges.

Mr. Perez Marchand: The six special charges have been denied, and the defendant by his counsel takes formal exception to the ruling of the Court. What was the amendment?

The Court: That instead of "members of the labor union," it was changed to "the employees of the employer."

Mr. Rodriguez Antongiorgi: The employees of the employer, that's the way the Act reads.

The Court: Special request 1 of the Government I will give. I will add, "I further charge you that the evidence has established without refutation that the defendant, at

the time of the events charged in the indictment, was such a 'representative'."

Mr. Rodriguez Antongiorgi: That was stipulated.

Mr. Perez Marchand: Of the employees of the employer.

The Court: The second charge is simply a quotation from the *Ryan case*.

Mr. Rodriguez Antongiorgi: Yes, and I think it is pertinent to a case like this.

Mr. Perez Marchand: I would like to add, by way of suggestion, that something more be put in that special instruction which is just as important and comes from the case of *United States* v. *Ryan*, and that is that under the circumstances mentioned in special instruction number 2 for the Government it must be also stated that the purpose also was to "prohibit [300] and punish favors or briberies to the representatives of the employees of the employers."

Mr. Rodriguez Antongiorgi: I would object to that. I put in this quotation because it is the only pertinent one to the case here. We are not dealing with bribery here, because this isn't the type of case. That is pertinent to the type of prosecution we have before the Court.

The Court: This isn't a case where both employer and employees are charged with bribery.

Mr. Perez Marchand: One of the phases of the *Ryan case* is that there is no explanation before the Court why the employers were not indicted with the employees.

The Court: That was a case in which it was shown that Ryan was receiving every month a payment of $1,000.

Mr. Perez Marchand: That was clearly a favor.

The Court: Here, that isn't the case. If it were a case where it were shown that without any explanation whatsoever these sugar corporations delivered to Arroyo two checks for $7,500 each, and that he cashed the checks and

got them without the establishment of a fund, etc., it would be proper then to charge that, but otherwise I don't think it is necessary.

Mr. Perez Marchand: If it may please the Court, the reason I have asked that addition is because headnote number 3 of the *Ryan case*, Justice Clark goes on to say that "As passed, the bill forbade employer contributions to union [301] welfare funds in order to make it unfair labor practice to give favors to any person in a position of trust." So I think that this charge should be added to and expanded.

The Court: I believe this language is more clear, more simple for the jury.

Mr. Rodriguez Antongiorgi: That's the type of case we are dealing with.

The Court: I will give this second charge, and I will also give the third charge, because the third charge is more or less a composite of the charges requested by you, but couched in the language that should be used, the way I construe it, omitting mention and all confusion about checks.

Mr. Perez Marchand: If I may point out logical, if not legal objections to this 3rd charge, it is to the effect that it does away, or nullifies the effect of the bill of particulars submitted by the United States Attorney under orders of the Court at the request of the defendant when called upon to explain how was the sum of money amounting to $15,000 received by the defendant. The Government, by the District Attorney, informed the defendant's counsel that he received the $15,000 in two checks of $7,500 each.

The Court: That is explained in the request number 4, in which the United States Attorney speaks of the checks.

Mr. Romero: May we assume that the way you understand this law is that if there had been no checks involved, and [302] that the employers had taken a bag of

money, of $15,000, and said, "Now, here is the money for the welfare fund", and Wadelmiro Arroyo as president of the union accepts the money in the name of the union, takes the money and runs away with it, that he would fall under this statute?

The Court: Oh, yes. Absolutely.

Mr. Romero: That's your interpretation of this?

The Court: Absolutely. Absolutely. He could be prosecuted under this statute, just the same as he is. Instead of checks, if the corporations would have given him a note to Mr. Perez Marchand, "Perez, give Mr. Arroyo $15,000—"

Mr. Romero: Oh, well, no.

The Court: —"give Mr. Arroyo $15,000 which are destined to open a welfare fund for the union he presides", and then Mr. Perez Marchand gives the $15,000 and Arroyo takes the $15,000 to a bank and opens an account in which he is the only person entitled to withdraw it.

Mr. Perez Marchand: For the record, may we construe your statement and ruling to mean that if at the time of the negotiations, the signing of the agreement, Wadelmiro Arroyo had been handed a bag containing in various denominations the amount of $15,000, and had taken it to the bank and deposited it in the account of the union—

The Court: Yes.

Mr. Perez Marchand: —but later proceeded to draw on the account for purposes other than those encompassed in [303] the agreement of the fund, he could be charged under Article 186?

The Court: Yes, if he deposited it to be drawn on exclusively by him, and the fund were not subject to the control of the trustees, and subject to all the requirements of the Act, then the fund never existed,—never lawfully

existed. And it was a receipt of money not for any of the lawful purposes which excuse him under the section.

Mr. Perez Marchand: The Judge will forbear and forgive that we ask these questions, because we are very conscious of the fact that we are dealing with a new case and that the interpretation to be given to the statute under which the defendant is charged in this case will establish a precedent one way or the other, and it is our earnest purpose not only to do our utmost in the fulfillment of our duties, we want to have the Judge cooperate with us and help us in establishing as clearly as is possible under the circumstances, the various angles and the points of view regarding the interpretation of the terms of the statute.

The Court: Charge 4 requested by the Government I will also give. Now, in connection with all this discussion, I must say, Mr. Perez Marchand, that as regards fraudulent representations or embezzlement the only instance in which, in my opinion, it could be possibly alleged as a defense would be when the fund is lawfully established, and an account is [304] opened to be drawn on in accordance with the law, with the intervention of all the trustees, that is, management and labor, following all the requirements provided by the Section, and then, if a representative of labor gets a check from that fund, regularly issued, purportedly for purposes lawfully permitted by the law, but he uses the money for other purposes, then I believe that a defense of embezzlement could be raised. Because then, what he did was at that time, after the fund was legally in existence and operating in proper form, he obtained money from the fund under false pretenses. Then, of course, the situation would be different.

Mr. Rodriguez Antongiorgi: Your Honor, I would like— I don't know whether the Court had it in mind but that was the subject of a stipulation, but I think there should also be an instruction on the fact that it

has been stipulated that these two companies were employers of employees represented by the defendant, and that they were engaged in a business involving interstate commerce.

Mr. Perez Marchand: I think that was stipulated at the beginning.

Mr. Rodriguez Antongiorgi: It was, and I think it should be before the first instruction, that they are companies engaged in interstate commerce, Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., and that they are both engaged in business affecting interstate commerce, and that the members of Local 1781 represented by the defendant [305] were employed by the same companies.

The Court: That is, Local—?

Mr. Romero: Local 1781.

The Court: Local 1781, as well as other employees.

Mr. Rodriguez Antongiorgi: And I think, Your Honor, so that—

The Court: Not belonging to said union.

Mr. Romero: What's that last part?

The Court: As well as other employees, not belonging to said union.

Mr. Romero: What was that, the stipulation?

The Court: That they were employees of the Central Mercedita which employed union members and others who were not members of the union.

Mr. Romero: This hasn't been proven or stipulated in this case.

Mr. Rodriguez Antongiorgi: One of the witnesses said he was not an employee. But that isn't material.

Mr. Romero: I don't think it is material.

Mr. Rodriguez Antongiorgi: I think it should also be said that we stipulated that this union was certified with

the National Labor Relations Board, within the meaning of the Labor Management Relations Act of 1947.

Mr. Perez Marchand: Yes, that was stipulated.

The Court: As the bargaining union.

[306] Mr. Rodriguez Antongiorgi: As they call it, "certified to and in compliance with within the meaning of the Act."

The Court: Was certified as the bargaining union for all the employees.

Mr. Perez Marchand: Affiliated. Not all the employees.

The Court: No, the bargaining unit is for all the employees, affiliated and non-affiliated.

Mr. Romero: There can be two unions, not one.

The Court: There can be two unions, and nevertheless if one is the certified union—it happens here you have the GCT on the docks, and the ILA members working there, and the ILA had to abide by the bargaining made by the GCT which represents all the men, unionized and not unionized.

Mr. Romero: That's all right. It isn't material.

* * *

[307] Mr. Rodriguez Antongiorgi: Your Honor, Mr. Foreman, ladies and gentlemen of the jury. In my opening statement I told you that this case involves a question of principle. It was not proper at that time to explain what I meant by that, but as sort of introduction to this summation I will explain what I mean by that.

As we all know, one of the most dramatic chapters of modern American history, including Puerto Rico, has been the great fight and struggle between capital and labor. Great issues have been at stake. As a result of that great struggle, especially during the last fifty years, there has been industrial strife, there have been work stoppages, there have been strikes, there has been violence, and all the citizens, not only the employers and employees affected,

have been [308] subjected to great suffering, because of that. Now, during the last fifty years also, especially through the process of adjustment in line with American democratic principles and through the process of education, and during the last twenty years I might say through the intervention of the Government, we have come to accept certain principles as basic in this fight between labor and capital.

There are certain things that no matter what our economic or social views personally may be about these problems, are today considered fundamental and basic. One of them is the principle of collective bargaining. Another principle is the right of labor through legal and organized unions to, in a legitimate way and lawful way, demand benefits for their members, such as higher wages, well-being for their families such as in modern times is called welfare funds, better working conditions—those principles we all accept today.

Now, in the majority of cases, especially and particularly so in the United States as you all know labor unions today are well organized groups administered in an honest, legal way, represented by responsible officers who do their best as they should to obtain benefits through collective bargaining from employers, but abstaining in an ethical way from engaging in unfair, dishonest practices or to go beyond the bounds of the law.

[309] Unfortunately, however, we still have in the United States and in Puerto Rico certain labor leaders who have not come to accept those principles, and who utilize the power that they obtain from the unions, not for the benefits of the people they are supposed to represent and for the employees, but for their own personal benefit and well-being. There have been various phrases given to that type of practice by unscrupulous labor leaders, one of the most graphic is what they call labor racketeering.

Precisely because of those conditions I would say, in a minority of the unions, Congress in the year 1947 passed the Labor-Management Relations Act, commonly known as the Taft-Hartley Act, and the law finally came to be part of the United States. There are many aspects to this law. There are civil aspects. We are not concerned with that, but there is this penal provision under which this defendant is being charged here. And that provision of the law, that Section 186 upon which the Judge will instruct you, carefully outlines the situations under which it is not permitted by law either by the employer to give favors to the representatives of the employees, or by the employees representative to receive from an employer in an unfair, unscrupulous, dishonest way favors, which means, as the law says, anything of value, which includes of course money.

We have heard here, you have heard the evidence, and you have before you one of the most typical cases, I [310] believe, of the type of situation that Congress had in mind when they passed this law. I think the evidence is fresh in your minds, but I am going to make a very, very concise review of that evidence.

We have a defendant here who is the leader and the representative of the employees, and the president of the union. Through his own evidence and through the testimony of three witnesses who came here and gave a complete story which followed word by word one after the other, and who were, I must say, as they admitted, on the payroll of this defendant. We have a defendant who has complete control of this union. There is, pursuant to the law, a bargaining agreement and welfare fund created prior to this indictment, to 1953-1952, and that was administered for the purpose provided by law for such a high purpose as medical care for members of the families of these employees. And that was administered in accordance with

the law and for the benefit of those employees by having a committee, and of course a most effective way to control that and to make sure that that goes where it should go, it was done by having a representative of the employer, Dr. Clavell in 1952, and a representative of the union counter-sign those checks, so that the withdrawals would be checked.

But what happens? The defendant, who has great power with his union, starts negotiating a new collective [311] bargaining agreement with the employer. I don't know what pressure, that's not before you and there is no evidence, I say we don't know what pressure was used by this dence, I say we don't know what pressure was used by this defendant with these employers. However, the thing is we have a new collective bargaining agreement and a new welfare fund which, I must say, was a substantial benefit obtained, the welfare fund in the sum of $15,000, for the medical expenses, for the sole purpose of providing medical expenses and care for the members of the union. But this defendant, right from the beginning as you can clearly infer from this evidence, gets the very bright idea and the very unscrupulous, illegal idea of having this fund handled as his own personal account. And that is exactly what he did, according to the evidence. According to the evidence of the Government, as has been fortified and strengthened by the evidence produced by the defendant himself, as I will show to you.

How does he do this? He gets the checks. I am not very much concerned whether he was there to get the checks or whether Armando Rivero gave them to him; their own testimony was contradicted on that, because one of the witnesses for the defense was Mr. Aragon, and he says it was given to the defendant himself, so that's the real credible evidence, but I don't know why they make such a point of it, I don't care if he got it himself or not. So he

goes to the union and instead of depositing that amount as in previous years, [312] and following the course as in previous years in the Banco de Ponce in accordance with the law, he obtains in a mysterious way which has not been explained, and authorization from the bank to have the sole and complete control of that account. Just what I said, to have a personal account of his own for $15,000.

This, ladies and gentlemen, is the highest and best evidence of the intent of this defendant right from the beginning, when he received those checks, but when did he get the money? When he went to the bank with this, he knew that. Now it is very significant, ladies and gentlemen when you consider this document, the evidence produced by the defendant. He had three or four officers of the union here as his own witnesses. Did you hear any of my distinguished colleagues here ask any of the members of the union whether there was such a meeting held on February 22nd? They didn't ask them that. The only uncontradicted evidence as to that was that there wasn't any such meeting as Luis Silvagnoli testified. Now, whether that's Silvagnoli's signature, you examine the document and Silvagnoli testified—the poor man was expelled from the union. What happened is really not our concern, but we can use our imagination. What happens? One of his own witnesses who had left with him a little strict honesty, in testifying when he was asked about that and comparing this document says, "I have seen Luis Silvagnoli's signature and this does not look like his." His own evidence. [313] Now, the money is in the bank, there is an account, the man refuses to see, even to confer with Mr. Goyco, the other representative, the representative of the employer. He has the authorization, a fraudulent authorization before the bank, and what happens? He draws from the account. How well you know! I didn't have to prove how the $15,000 was spent. The fact is, from these

ledgers, that they were dissipated in less than four months, in around four months. A welfare fund that was created to last for the years 1953, 1954, 1955. We know where some of the money went. It went to give a down payment for an automobile for his own personal use. The money went to buy furniture for his home, some furniture for the office, I admit, which is also illegal because that wasn't for the purpose of providing furniture for the office; it was for medical expenses and hospital care for the members of the families of the union. Then, he has a personal account in Banco de Ponce, and when he feels like it, he owns the account, so he transfers one check of $600 from the welfare fund account over to his personal account, and of course he drew from his own personal account. And on another occasion, he must have been short of money, he transfers $700 from the welfare fund account and the money goes over to the personal account.

Some of these witnesses that he had here received very little, I must say. Some of them received in one month [314] $20, once in a while. So the whole purpose of the Act, the whole purpose of the Law, the whole purpose of the benefits to be received by the families of these employees is completely frustrated. And the great labor leader spends $15,000 from the welfare fund for his own personal benefit.

That's exactly the situation that you have before you, and that's why I said that's exactly the typical case that the members of Congress had in mind when they passed this law.

Let's look very shortly at the defendant's evidence which as I said just strengthens and fortifies the case for the Government. As I said before, they have here the members of the union. The officers of the union, the vice president the "vocales". Did they ask them any questions, whether they or any members of their families had received any

benefits from that fund? At least I thought that some of them would have said, "Well, my mother was taken care of. My wife was taken care of." But no questions about that.

So, we have not only the money that has been actually proved to have been used to his own personal benefit, but as to the rest of the money there is no evidence where the money went, but it is significant, very significant, that none of these witnesses were asked whether any of their families received any benefits. So that's why I said that this is a very important case, and important for the whole community.

[315] I have presented this case to you, ladies and gentlemen, as you have seen, as I usually do, without heat, without passion, just based on the cold facts and evidence, and the testimony of witnesses before this jury and this Court, and in this particular case, ladies and gentlemen, the evidence is overwhelming. I don't see how you could have any doubts whatsoever, of the intent of this defendant, not only the intent, the purpose of this defendant right from the beginning was to use all this $15,000, which I must say is no small sum, for his own personal use, and of course in violation of all the provisions of the Act.

The Government has done its part in presenting this, which in a way is a rather difficult case because of the documentary evidence, and of course you as citizens of this community and in line with the oath you have taken, it is now your part. And on the basis of this overwhelming evidence I ask you to bring a verdict of guilty. Thank you.

Mr. Perez Marchand: If it may please the Court, I take pleasure in acknowledging the coolness and repose with which my very distinguished brother in the law has submitted this case to the jury. Especially I am profoundly satisfied in the fact that he recognizes that we are

dealing with a very novel case. It is a new case. It has no precedent. It is not to be found in the history of the labor legislation that is in force in our Island. It can not be found in any of the [316] cases that have interpreted or applied the National Labor and Management Relations Law. So being that we are treading on very flimsy grounds, we are not going to build on a wrong foundation, and must be very careful to do our duty in the present case by having upper-most in our minds that the verdict must be entirely realistic and completely strange to any elements of technical interpretation or personal sympathies or dislikes. If we can be as impersonal as the law is, we shall do a great job for the community, and I am not speaking of any individual nor do I have in mind now the defendant, when it comes to an interpretation of the facts in the light of the law and the evidence which may mean the establishment of a wrong conception of justice or an enduring historical decision for the years to come.

Very rightly, the United States Attorney started his argument by saying to you that this case involves a question of principle. And then he goes further to say what has been the result of labor and capital relations in the last decade, and how for a number of years the Congress of the United States has endeavored to stabilize and maintain on a level of equal reach, hand to hand, the undisputed and acknowledged forces of organized capital and organized labor.

It is, I think, not amiss to make references now to the point that the question before the jury concerns specifically that section of the Taft-Hartley Law that deals with [317] the relations of labor and capital which determine or may determine the passing of moneys or things of value from the capital end of the business life of the country to the labor side. And I wish to call to your attention and emphasize that in the light of the interpretation given to

this specific portion of the law by the highest tribunal of the land, the history of the statute is to the effect that through Senator Taft, one of the co-authors of the law, when the law was found to be wanting in certain elements of reciprocal restraint; that is, means by which capital could act without the overbearing power over labor, and labor might be getting out of hand if not duly limited, it was Senator Taft himself who introduced by way of amendment the clause, the article which you are to apply today in this case, and in the words of the Supreme Court of the United States, Senator Taft brought this thought into law, to prevent cases where the union leaders or representatives might, by reason of their position, shake down the employers. And, naturally, prejudice their rights and injure the employees.

In other words, up to that moment the Congress of the United States had been repeatedly harrassed with complaints of incidents showing that capital wanted restrictions on one and not restrictions on the others, or the organized labor came up and asked that there be teeth put into the law to avoid speculations and destructive influences of labor.

[318] As a result of that, the statute was modified to read that from that day on, it would be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or agree to receive or accept, from the employer, money or other things of value or this particular phrase, "Money or other things of value", have been more than once interpreted to mean different things, but the last opinion on the matter, the latest authority on what this is in terms of the Supreme Court, is favor or bribery to ...

Mr. Rodriguez Antongiorgi: May it please the Court, I hate to interrupt, but I think counsel is interpreting the

Act, which is a matter of the instructions. If we go into the matter of interpreting the Act ...

The Court: The law has to be given to the jury by the Court.

Mr. Perez Marchand: For the record, I think that ...

The Court: You may read the law, of course.

Mr. Rodriguez Antongiorgi: I don't object to that, but the interpretation of the law is to be given by the instructions of the Court.

Mr. Perez Marchand: I very respectfully pray that if counsel for the defense is entitled to read the law, counsel for the defense is entitled to quote the highest opinion of the law.

[319] The Court: I will permit you to, and I will permit the United States Attorney to make comments on the law, and then I will charge the jury not to pay any attention to what you or he says about the law, because the law will be what I tell them.

Mr. Perez Marchand: And, in order to bring the tension that may be in your minds because of this—you needn't be surprised—lawyers will never agree when they are on opposite sides, if they did there wouldn't be a way of gaining a livelihood by either side. Coming back to the facts which you will soon have before you and the documents which you will have to consider, and I believe my distinguished colleague will not gainsay my statement that in order to decide this case you will have to read the letters and other documents in evidence, and have in your minds the law which makes it imperative to decide if, by reason of the evidence and according to the words of the indictment, the crime has been committed with which the defendant is charged. You will note when you have the indictment before you, that the defendant in this case has not been charged with having done some positive act, which is contrary to the law. The indictment reads ...

Mr. Rodriguez Antongiorgi: Your Honor, this is all law. The indictment is not evidence. It is the formal charge.

Mr. Perez Marchand: This is facts.

[320] The Court: I will permit it. You may argue about that.

Mr. Perez Marchand: The indictment charges in negative terms that the defendant is guilty because he did not do this, did not do that, did not do the other thing, and to be exact, because, I am reading directly from the indictment "On the 24th day of February 1953, the defendant Wadelmiro Arroyo wilfully and unlawfully received from the Puerto Rican American Refinery, Inc., and Central Mercedita, Inc., a sum of the money in the amount of $15,000, which sum was not received by him for services nor was such money received as payment to a trust fund established by the defendant or any other representative of the employees." The charge is negative. He is charged with having unlawfully received a sum of money which was not destined to pay a welfare fund, and which in terms of this indictment would be a violation of Section (b) of Article 186 of Title 29, United States Code, on which and about which you will be instructed, and specifically because by doing as he did he did not comply with any of the exceptions which in the law make the section not applicable.

In other words, whoever does as stated is guilty, unless he has received the money for the purpose of a trust fund established by negotiations. The indictment tells you this man is guilty of having received $15,000 from the employers, which money he did not receive for payment of a trust fund, established by the union and the employer. That's what [321] the letter of the indictment says. Therefore, he must have violated this section. And then the Government comes forward and to show that he did not receive the moneys or the equivalent or things of value represented

in the negotiations for the purpose of establishing a welfare fund, the Government produces Exhibits 4 and 5, which are two checks—checks you have seen in the hands of various witnesses, and checks which on their attachments and as stated by the management, head of both enterprises, Mr. Aragon, in the chair, were delivered to the man to comply with the statement written as a legend or for the concept herein expressed in both cases. The concept is to cover the contribution that the employers must make under the agreement to the welfare fund of the union, which was represented by the defendant.

And when this lawyer asked Mr. Aragon, "What manner of conduct, what attitude did the defendant show when you delivered to him these two valuable documents to do as stated in compliance with the bargaining agreement dated February 2, 1953?" I asked him, "Did he haggle, did he discuss, did he show any reaction?" "Oh, no. He accepted them." "As drawn?" "Yes, sir." These documents were taken by the defendant, then, for the payment of a trust fund established by the union and the employers, and each one was deposited with the bank in the account of the "Union de Trabajadores de Factoria, Refineria, y Ramas Anexas, Fondo de Beneficencia," [322] and the same reading appears on the check given by the other employer. And by the exhibits that will be placed in your hands for examination and perusal, you will see that in the account at the bank the legend reads that the documents were deposited for the purpose of the welfare fund of laborers of Central Mercedita and the Refinery. So far, so good.

We hold, we maintain, as a matter of fact we are not discussing the law, that if the Government has charged the defendant with having failed to do as required by the Act, that is, he could only receive money or things of value if he was receiving it for payment to a trust, being charged

with having done the opposite, that is, that he received it for some other purpose which is the crime, the proof which is not the defendant's evidence but the Government's evidence shows that the things of value, the checks of both Centrals were given to him with the specific legend, according to the bargaining agreement of February 21, 1953, and as such was deposited in the bank.

In order to show what we have contended can not be your concern in this case, but with a very plausible temerity my colleague has forced through—if I were as young and spry as he is I wouldn't take a dare for him to run because probably I wouldn't see him after he started. He certainly is swift. He shows you a very able man, Exhibit 8, which appears to be a letter reflecting a Resolution by [323] the union represented by Wadelmiro Arroyo to the National City Bank telling them, telling the bank, that it is Wadelmiro Arroyo who has been empowered by the Board of Directors of the union to handle the account and draw on it. This is on the 2nd of March. A few days had passed. Six days had passed since this was received and deposited. This is already in the bank. This has already been made money. During the act it accredited the money, available not for himself, not as a gift, not as a favor, but to pay to the trust, the welfare fund. And what happens to this letter? It has been handled by us to the point of making wrinkles on its face, but it must have been very badly handled, mishandled in the point or place of receipt, because this document has not been subpoenaed from the defendant, did not come into court from the offices of the union, it comes from the bank, and one of the witnesses, one Galib Rivera, vice president, upon looking at it says in a very earnest way, "This is the document, but our signatures do not appear there. They have been torn off, cut." My question is, ladies and gentlemen of the jury, if this document was beyond the reach of the defendant, could

it serve him in any way or give him any help, or do him any good to mutilate it? If this document which is nothing but an indication or suggestion of the bad use of the money received in compliance with the law, was cut as to those signatures, who could have done that, if the [324] mutilation did not harm, but benefit the defendant? If this document had been in the hands of the defendant to this day, it would have been as it was drawn, written and signed, because it would have been to his interest to show that things happened as stated and that this man who appears signing below supported his contentions.

The Court: You have already consumed 30 minutes.

Mr. Perez Marchand: I will be closing, Sir. I think I should wind up my argument referring you to a statement made by my brother attorney for the Government, which I think is greatly exaggerated. I don't mean to imply that he has done it with the idea of personal prejudice, but he has gone beyond the figures and said to you that the great leader now at the bar spent for himself the $15,000 that he received for a welfare fund. When you look at the documents and you read the papers brought by him to show how this was mis-spent, you will confirm my affirmation. You will not find that there is over $1,500 spent in the dubious way in which the case has been presented by the Government. So there is $13,500 still—

Mr. Rodriguez Antongiorgi: Certainly not supported by the evidence, the argument that my colleague is making now.

Mr. Perez Marchand: Well, I hope the jury will realize that I am supported by the evidence in saying that when my colleague inferred that $15,000 have been misused and embezzled, [325] which is no part of this case, nor the law pertaining to this case, he not only exaggerated but he went beyond the limits of reality because you will not find over $1,500 brought to your attention by the District

Attorney as evidence of misuse and embezzlement of the welfare fund.

And I close, ladies and gentlemen, saying to you that we are dealing with a case for violation of the article of the Penal Code of the United States that will be read and turned over to you for examination according to what this charge reads, and that you will have some confirmation of the fact that the negative way in which these charges have been made against Wadelmiro Arroyo, but the positive way in which the Government has proven that Wadelmiro Arroyo did receive the money for the welfare fund and deposited the money for the welfare fund merits an acquittal. Thank you.

Mr. Rodriguez Antongiorgi: May it please the Court, how many minutes do I have—five?

The Court: Twelve more minutes.

Mr. Rodriguez Antongiorgi: Your Honor, Mr. Foreman, ladies and gentlemen of the jury, as I was hearing Mr. Perez Marchand I am reminded that it is said that when an experienced and able attorney like my colleague Mr. Perez Marchand is confronted in the performance of his duty as an attorney with a task of defending an indefensible case, they do one of two things. They pound on the table very hard and [326] yell—Mr. Perez Marchand isn't that type of an attorney because he is a very quiet man, very elegant, but if they don't do that they pound on the law. They say. And Mr. Perez Marchand has taken the position of pounding on the law very ably with a purpose of trying to create some kind of confusion but I am sure you will not be receptive to that.

And fortunately also, because—and I am now being serious, in the interests of justice you don't have to deal herewith these very minute questions of law. The Court will handle that, and will advise you on the law. The only questions that you have to decide will be questions of fact

in accordance with the law that will be given to you by the Court.

I might say also that Mr. Perez Marchand is an expert in the art of semantics, the play of words, because what he tries to do is impress you and make you believe is—what I think he was trying to impress you with was because the two Serralles companies issued these two checks there in compliance with the law, otherwise they would have been violating the law, they issued them for a legal purpose, the establishment of a welfare fund, and because the defendant received these two papers there can be no other violation of law. That's all done. Whatever he did from then on is not a violation of law. That's what he is trying to impress [327] you with that argument.

Of course, the Court will advise you I am sure that checks as we all know are not money. They are mere orders for the payment of money, and that when this defendant took these documents and went over to the bank and through the fraudulent means that he did, opened an account where he had the sole and complete control, and then started drawing on the account, that's when he received the money and the $15,000, and what I said about the $15,000 is not that we proved here—we didn't have to prove here that he utilized the whole $15,000 for his own personal benefit, but what I emphasized and I say it again is that he utilized for his own personal benefit, you can get the figures when you go to the jury room, but there was $700, $600 in another case, there was the check for Casa Pacheco for $600, but what I emphasized was that he had, as his own witnesses the officers of the union in that chair, and the most logical question to ask was from those officers of the union whether either themselves or their immediate families or the members of the union had received any medical payments or benefits from this fund, and that was not asked by them.

That is what I emphasized, and that's what I said, that is very significant and of course it is up to you to pass judgment on that.

Now, one last word. There has been some argument [328] made by him about the wording of the indictment. Of course, these new laws of Congress covering these kinds of matters are very complicated, very technical. You don't have to worry about that, as I said before, but of course it is a reality, a question of law, I might say a matter of law. If this indictment were not good, the evidence would not have been presented here, because if the indictment were not in line with the law we wouldn't be trying the case. The Court would have already dismissed the case. So the indictment is not evidence. The indictment is merely a formal charge which has to meet certain requirements with which you members of the jury do not have to worry. That's for the Court to worry about.

So, Mr. Perez Marchand has limited himself to, as I said before, pounding on the law, bringing the play of words and running away from the reality of the thing, the real issue of this case, the real issue of fact, the receiving of these $15,000. With that I ask you again, and reiterate to you my plea that you bring a verdict of guilty.

Mr. Perez Marchand: May I please the Court. In accordance with the last statement by counsel that the jury will be deprived of—

The Court: He has closed.

Mr. Perez Marchand: I am asking a question.

Mr. Rodriguez Antongiorgi: Let's approach the bench. [329] The Court: If you want to, approach the bench, but I am going to declare a recess because the Reporter is tired.

Ladies and gentlemen of the jury, still follow my warning about not starting to deliberate or form any opinion of the case until you have received my charges. We are go-

ing to have a short recess of ten minutes to permit the Reporter to rest because she has been taking all these notes, and then she has to take my charges.

(The jury withdrew from the court room.)

Mr. Perez Marchand: Are we to understand, Your Honor, that the jury will not have access or the opportunity to read the indictment to pass upon the facts?

The Court: The indictment will be delivered to them.

Mr. Rodriguez Antongiorgi: Sure. Nobody has said anything about that.

The Court: That's the first paper that goes to the jury.

Mr. Perez Marchand: I understood from the statement of the United States Attorney that the jury would have nothing to do with the indictment.

Mr. Rodriguez Antongiorgi: No, of course not.

The Court: They can not come in and say, "This indictment is bum."

Mr. Romero: But if the facts conform to the indictment let them be charged.

Mr. Perez Marchand: Well, Your Honor, that's good enough for me.

[330] (A short recess was then taken.)

The Court: Mr. Foremen, ladies and gentlemen of the jury. The defendant Wadelmiro Arroyo is charged in this indictment consisting of one count as follows: "That he, on February 24, 1953, at Ponce, Puerto Rico, within the district of Puerto Rico and within the jurisdiction of this Court, did wilfully and unlawfully receive from the said Puerto Rican American Sugar Refinery, Inc. and Central Mercedita, Inc.," who according to the indictment are employers within the meaning of the Management and Labor Relations Act, and were corporations engaged in the processing of sugar cane into sugar in the Island of Puerto Rico, which is an industry affecting interstate commerce, "a sum of money in the amount of $15,000, which sum was

not received by him as compensation for or by reason of his services as an employee of such employers; now in satisfaction of a judgment of any Court of a decision or award of an arbitrator or impartial chairman, or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute; nor with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; nor with respect to money deducted from the wages of employees in payment of membership dues in a labor organization; nor was such sum of money"—and this is the most important portion of the indictment, because as to all the other exceptions the [331] evidence is to the effect that the only exception which is involved in this indictment is this one. "nor was such sum of money received as a payment to a trust fund established by the defendant or any other representative of such employees for the sole and exclusive benefit of the employees of said employers, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) for the purpose of paying for medical or hospital care, pensions on retirement or death of employees, compensation for injuries of illness resulting from occupational activities or insurance to provide any of the foregoing, or of employees' benefits or life insurance, disability and sickness insurance, or accident insurance, in violation of the Act referred to above," which is Section 186 (b) and (d) of Title 29 of the United States Code.

It is further alleged in the indictment that, "At all times hereinafter referred to, Local 1781 was a labor organization of the International Longshoremen's Association, formed of workers of the factory, refinery, and other branches of the sugar industry in the Island of Puerto Rico, an industry affecting interstate commerce, within

the meaning of the Labor Management Relations Act of 1947, as amended." And that, "At all times hereinafter referred to, Wadelmiro Arroyo was President of the said Local 1781, the labor union referred to above, and as such was the representative of employees of [332] the Puerto Rican American Refinery, Inc., and Central Mercedita, Inc., as hereinafter alleged, said employees being engaged in an industry affecting interstate commerce, within the meaning of the Act referred to above."

The statute involved in this indictment, so far as material, reads as follows: (b), That's Section 186 of Title 186, sub-section (b), "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Sub-section (c) "The provisions of this section shall not be applicable—" then of course the one material here is "with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, that such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or [333] life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with

the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund, and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or [334] annuities." Then, any person who violates the provisions shall be guilty of the offense.

I must charge you on the purpose of this statute. This section is a portion of the Labor Management Relations Act, and it must be read jointly with other sections of the Act which tend to protect both labor and management in their relations. Originally the National Labor Relations Act, of which this Act is now a chapter, only protected laborers. Then it was amended and this chapter which was known as the Taft-Hartley Act protects both employers and employees in their relations.

In connection with the general purpose of the Act what

this section seeks is to avoid that by receiving, by granting or receiving special favors, the representatives of unions or the representatives of the employees which have to deal and bargain for the benefit of the employees with the employers may be in such a position as to properly protect the rights of the laborers. That is, that if a representative receives personal favors, gets money or other thing of value for his own use and under his sole control, it is the purpose of the Act that he shall not be permitted to get that, and shall be penalized for that, because that would tend to weaken his efforts to protect vital rights of the laborers in collective bargaining.

In the same way it tends to avoid that management [335] may in a certain way influence labor representatives by offering them special favors to the detriment of the laborers. It also tends to avoid that labor representatives extort the management, extort employers to the detriment of the employers, in order to get favors from the labor representatives, and when the Act prohibits, as it does here, the receipt by any labor representative of the employees of money or thing of value from an employer unless it is for the specific purposes excepted by the Act, the particular purpose herein excepted is the creation of a trust fund, of a welfare fund, under the terms I have just read to you.

As you may see, this welfare fund is not only for the benefit of the members of the union. It is also for the benefit of all the employees, unionized or not, of the employer. As you well know, some of you well know, in collective bargaining the bargaining unit, the certified unit is that representing the union which, pursuant to elections, appears to have a majority of the laborers, so that bargaining unit is the representative unit. It is the certified unit, by the National Labor Relations Board, and its officers and representatives are the ones who represent not only the members of the union but all the other employees.

That means that thirty or forty percent of the employees may not belong to the union, nevertheless the bargaining is done by the representatives of the union for all the employees, and all [336] the employees have to share in this welfare fund.

It is one of the most vital purposes of this section, precisely to avoid that through the control or handling of any funds for this purpose by the representative of the bargaining unit, that's the union, other employees who are entitled to share in the benefits of the fund but who do not belong to the union may be deprived of the benefits. That's why Congress was so careful in providing that the funds should be established as a trust fund with designation of the representatives of the employers and the employees, and an umpire if necessary; that the funds be drawn only for the purposes provided in the sections I have read to you; to be provided for all the employees, even for those employees who do not fall within what we call units, such as foremen. The foremen are not comprised in the bargaining units, but nevertheless they are employees entitled to receive the benefits of the Act. And thus the Act further provides for a very careful and conscientious auditing of all withdrawels from that fund, to avoid preference or to avoid injustice to those who are not members of the union. And that protection is afforded, if the plan follows all the requirements of this section. So a plan does not exist, lawfully exist, until it meets all those requirements.

This section speaks about, uses the words "to receive [337] or to accept, or to agree to receive or accept." The term "receive" has been defined in Webster's New International Dictionary of the English Language, Section Edition, Volume 2, page 2076 as follows: "to come into possession of; to get; to acquire, etc." Another definition is "to take". You must have in mind these charges as to the law when considering the evidence.

The evidence here is to the effect that a collective bargaining agreement for the years 1953 and 1954 was being discussed between the employers here and the employees, all the employees, represented however under the provisions of the Act by this Local 1781 whose President was the defendant herein, and who as such was the representative under the Act. That in previous years, that is 1951 or 1952, similar agreements had been in force, between the employers and the employees, and that these agreements provided for a welfare fund, and that that welfare fund was administered as required by the law and used for the purposes contemplated by the law. That an account was opened in a determined bank, that is, in the Banco de Ponce, as a trust account and that withdrawals from that account had to be made through checks signed by the representative of the union, that's the defendant here, and then counter-signed by the representative of the employer, who at that time was Dr. Clavell, and the fund operated normally and was used for the purposes contemplated by the law.

[338] During the negotiations for the 1953-1954 contract provision was also made for a welfare fund for those two years. Clause (6) of that agreement which is in evidence here contains all the provisions about the creation of the welfare fund. Of course, it does not contain the machinery which was indispensable under the Act to properly create the fund, and that was to be done as per testimony here by mutual agreement of the parties, by following the same practice as the past, making a deposit that under testimony here was usually made by the representative of the employer opening an account as a trust account for the welfare fund and having two trustees, and a third one, an impartial one, and providing that all drawings had to be made by checks to be signed by Mr. Arroyo and counter-signed by the representative of the employer who as to the years 1953 and 1954 was agreed to be the witness here, Mr. Goyco.

The evidence further shows that when said agreement was finally accepted and signed, the employers issued two checks intended to be their contribution to the welfare fund, but to be deposited and used thereafter as a trust fund, following the same procedure of the past years, and strictly following the requirements of the Act, because if the requirements are not followed the trust fund does not exist, and if the trust fund does not exist then the money received is being received unlawfully under this section, [339] and the person who receives that money is liable to be indicted for the crime provided in this section.

There is, of course, a conflict as to when and where the checks were delivered. The evidence of the Government is to the effect that the checks were delivered by Mr. Aragon, who was the assistant manager of these two concerns, to Mr. Arroyo on the very day that the contract was signed, and in the offices of the employer. Mr. Aragon who was a witness for the defendant confirmed that. However, some other witnesses for the defendant testified that the defenant, as soon as the contract was signed, left the offices of the employers with all the members of the union. There is some evidence to the effect, one of the witnesses testified that he did not want to know anything or to have anything to do with the checks, he was dissatisfied by the conditions, etc. And that then the day after that, then the checks were delivered to one Rivero, I believe it is.

Mr. Perez Marchand: Armando Rivero Chavez.

The Court: Who was an organizer of the CIO.

Mr. Perez Marchand: No, of the ILA.

The Court: The ILA, and that Rivero took the checks the next day to the union offices and that there he had to insist with the defendant to convince him that it was better to take the checks, and that they talked about something else. [340] The evidence further establishes that the defendant obtained the endorsement on those checks from the sec-

retary of the union, Silvagnoli, and then he himself endorsed the checks as president, and took them over to the bank, to the National City Bank, it wasn't the Banco de Ponce, but to the National City Bank, jointly with a letter which I believe is Exhibit 8, a letter or certificate, I don't know, bearing a signature saying So-and-So Silvagnoli, Secretary, and bearing his own signature, instructing the bank to deposit that money in an account of the union and authorizing the bank to permit withdrawals on that account exclusively under the signature of the defendant.

The only card that the bank had as authorized signature was the card bearing defendant's signature. Nobody else could draw on that. He did not need anybody else to counter-sign or do anything as to that.

The evidence further shows that the defendant started to make withdrawals from that account on his own signature, that he never attended the offices of the employer who had been calling him to tell him that the checks had to be deposited in the Banco de Ponce as a trust fund, and subject to being signed and counter-signed as required by the law. He did not go to the offices. He did not pay any attention to those requests. Then the employer wrote letters to the National City Bank complaining of that deposit and those [341] withdrawals. The account had then been reduced to $9,800 and some odd dollars. Then the bank closed the account and delivered to the defendant a manager's check for that amount. That manager's check is here too, as evidence. Then the defendant, without going to the employer or trying to meet the requirements of the law, deposited that check in an open drawing account or current account that the union had with the Banco de Ponce on which the only authorized signature was the defendant's signature. And he continued to withdraw from that account with his own signature.

There is also evidence of one of the witnesses, I believe

it was Silvagnoli, who said that he was present at a meeting on March 26th, or something, a Convention, where the defendant insisted that nobody else had to sign checks for the union, that he should be the only one authorized to sign checks because he wanted to have the check book in his pocket and as he was traveling from one place to the other he wanted to be ready to draw on those funds, those checks in that account, without trying to search for and locate any other person.

That's as far as the situation concerning this money, this $15,000. I believe that the bank records here, the ledgers of both banks show that the withdrawals from that account have been considerable and there is a very small balance in that account at present.

[342] There is evidence also to the effect that with checks on one or the other accounts the defendant paid down payments on his personal automobile, he paid the balance of a refrigerator, springs and mattresses at a furniture store in Ponce; he also paid for office furniture and office supplies, and checks were also issued to some of the witnesses who testified here, as salaries for services to the union, and others as loans.

There is not, however, any evidence that a single cent of this $15,000 was ever used for what the law has specifically ear-marked them for, that is, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability or sickness insurance, or accident insurance.

The defendant Wadelmiro Arroyo has pleaded not guilty. This plea of not guilty puts upon the United States the burden of proving to your satisfaction and beyond a reasonable doubt, all the material allegations of the indictment. The

indictment itself is not evidence before you, but it is merely the formal presentment or charge of the Grand Jury upon which the defendant is put to trial.

If you believe from the evidence, beyond a reasonable [343] doubt, that he committed the charge against him as above explained, in the manner and form charged in said indictment, then you must find him guilty of the offense charged in the indictment.

The law presumes that a person charged with a crime is innocent until his guilt is established by the evidence beyond a reasonable doubt. The defendant in this case is entitled to the benefit of this presumption and it stands as sufficient protection to him until removed by facts establishing his guilt beyond a reasonable doubt.

A reasonable doubt is such a doubt as would cause a reasonable and prudent man, in the graver and more important affairs of life, to pause and hesitate to act upon the truth of the matter charged. But a reasonable doubt is not a mere possibility of innocence, nor a caprice, shadow of speculation as to innocence not arising out of the evidence, or of the want of it. The jury should patiently and dispassionately weigh and consider the testimony and bring to bear upon it the exercise of common sense and judgment as reasonable men and women; and if, after considering the evidence, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt.

You are the sole judges in this case of the credibility of the witnesses, and the weight to be given [344] to their testimony, and for that purpose you may consider the fairness or unfairness, the prejudice, bias or interest in the result of your verdict, if any, of any witness who has testified before you, his demeanor while testifying, his apparent carefulness and fairness on the stand, his opportunity to know and correctly relate the facts, and to determine from

the whole of the evidence where the truth in the case lies.

If you believe that any witness has knowingly testified falsely, as to any material point or fact in this case, you are at liberty to disregard the whole or any portion of the testimony of such witness, unless the same is corroborated by other competent evidence in the case which you believe to be true.

The Court instructs you jurors, that a defendant may, if he sees fit, became a witness in his own behalf; but the law imposes no obligation upon him to testify in his own behalf, or as to any material fact in the case, and the fact that a defendant may not take the stand and testify as a witness in his own behalf raises no presumption against him who so fails to testify.

You have no right to allow your prejudices, or your sympathies or what may be the consequences of your decision to affect your verdict, but you are bound by the oath you have taken to decide the case according to the evidence as you have heard it, and the law as given to you by the Court.

[345] I must further charge you on certain questions that you must have in mind in arriving at a verdict. It has been established that Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., were employers engaged in interstate commerce, and also that the members of Local 1781 were employees of said corporations. Local 1781 was certified by the National Labor Relations Board as a bargaining unit for all the employees, not only for the union, but all the employees of said employers.

I must also try to dissipate any confusion you may have as regards the checks, as regards the vouchers, the statement in the vouchers. As I see the statute, the purpose for which the money or anything of value is delivered and received must be a mutual purpose. If the employer, in delivering money delivers it for the exclusive purpose of

creating a fund, and that it be complying with the requirements of this section, the representative receiving that money must have the same objective in mind. Now, if his objective is different, and if he gets hold of the money and does not comply with the provisions of this section as to the fund, the welfare fund, as required by the employer in the entry on the vouchers, then he can not claim that what the employer said must guide you.

You must be guided simply by what happened. What was the actual situation? What were the circumstances under [346] which this money came into the possession of the defendant? What the employer might have intended does not count, unless that purpose is accomplished. At least there must be mutuality.

I also charge you that under the provisions of Section 186 (a), (b), (c) and (d) a representative of the employees of the employer within the meaning of the Act may be prosecuted irrespective of the fact that neither the union nor the employer is prosecuted.

I further charge you that the evidence has established without refutation that the defendant at the time of the events alleged in the indictment was such a representative. I also charge you that one of the main purposes of the enactment of the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, of which the section here is a portion, was the fact that the Congress was disturbed by the demands of certain unions that employers contribute to welfare funds which were in the sole control of the union or its officers, and could be used as the individual officers saw fit. Precisely to correct that evil it was that one of the purposes that Congress had in approving this section before you.

I further charge you that if you believe from all the evidence beyond a reasonable doubt that the defendant Wadelmiro Arroyo obtained or received from the employers

[347] Central Mercedita, Inc., and Puerto Rican American Refinery, Inc., the sum of $15,000, and that such sum was not used by him for the purpose established by law, which is for the sole and exclusive benefit of the employees of the employer and their families and dependents for the purposes of paying for medical and hospital care, pensions, on retirement or death of employees, but rather if you believe that from the time the defendant received said sum of money from the employers he had complete and sole control of said money, in violation of the collective bargaining agreement and the law, and utilized such money or any part of it for his personal benefit, then I charge you that the defendant has violated the above mentioned section of the law on which he is charged, if you so find, and then you should find him guilty.

With respect to the checks in the sum of $7,500 each and the supporting vouchers issued by the above mentioned companies to the union and marked Exhibits 4, 4-A, and 4-B, and 5 and 5-A for the Government, I charge you that checks in legal contemplation are merely orders for the payment of money, and if you believe from all the evidence that said checks were received by the defendant Wadelmiro Arroyo and that he procured an alleged letter of authorization from the union, authorizing him to open an account of the welfare fund covered by said sum of money, and that he actually did [348] open that account and had sole and exclusive control over that account, then I charge you that the money was actually received by the defendant at the moment that he had control of said account in such a way that he was able to withdraw funds from said account.

By nothing which the Court has said in these instructions, nor by its rulings in the course of the trial, has it been the intention of the Court to express, nor does it express, any opinion upon any of the facts in issue in this case, all such being reserved exclusively for you as the

trial jury. In deciding this case you should not consider as evidence the statements of counsel in your presence, nor testimony which may have been ruled out or withdrawn by the Court from your consideration, nor should you conjecture what would or would not have been the answer to questions which the Court may have ruled could not be answered.

The statements of counsel, that is, the United States Attorney and attorneys for the defendant, as to the law, should not be taken by you as the correct law. You have only to follow, as to the law, what I have said in these charges. Your verdict, of course, must be unanimous.

Come over here, please.

(Counsel approached the bench.)

The Court: For the record, the Court has denied the [349] six special requests for charges made by the defendant, and has granted requests 2, 3, and 4 of the Government, and also request 1 with certain modifications by the Court. Are there exceptions to the charges?

Mr. Perez Marchand: To each and all. Let me clear one point in the relation of the evidence to the jury. The checks were deposited on the 24th of February, and the letter was sent on the 2nd day of March. Your statement to the effect was—

The Court: Is that so?

Mr. Perez Marchand: Yes, I have it.

Mr. Rodriguez Antongiorgi: Of course, there were no withdrawals until March 6th, until the letter came through.

The Court: That's the only clarification?

Mr. Rodriguez Antongiorgi: Yes, but there were no withdrawals until March 6th. I am not clear on this point. I believe that when you related the evidence you mentioned that the employers had requested from the bank, from the National City Bank. I think, if my recollection is right, I think that was through a letter to the Banco de Ponce.

and not to the National City Bank, because there was a letter addressed to the Banco de Ponce, and not the National City Bank.

The Court: And you have no exceptions to the charges?

Mr. Rodriguez Antongiorgi: No.

[350] The Court: And you except to all of them?

Mr. Perez Marchand: Yes, to each and all.

(Counsel withdrew from the bench.)

The Court: Ladies and gentlemen, in recapitulating the evidence I made a mistake which I must correct. I said to you that deposit of the checks at the National City Bank had been made on the same date that the letter of authorization, Exhibit 8 for the Government, instructed the bank that all the checks be only signed, the only authorized signature was that of the defendant. I told you that that happened on the same date.

The fact is that the deposit was made on February 24, 1953 and the letter of authorization was not sent until March 2, 1953. But I also charge you that as per the ledger no withdrawals whatsoever were made between the date when the checks were deposited and the date when this letter was received. In fact, the first withdrawal was made March 6, 1953. That's four days after the letter was received. When this letter was sent to the bank the fund was still intact.

I also must correct my statement about the protest of the employers, that the evidence does not support what I told you, that the employers had protested to the National City Bank. That's not so. The only protest is the protest when they received a letter from the Banco de [351] Ponce, then they protested to the Banco de Ponce, not to the National City Bank.

The Clerk will deliver to you the indictment—here it is, and all the documentary evidence admitted at this trial, and also a form of verdict. This form of verdict is already

printed. If you find the defendant guilty, all that needs be done is for the foreman to sign here. If you find him not guilty, then you insert the word "not" in the blank space before "guilty", and the foreman then signs it. You may now retire to deliberate.

(The jury withdrew to the jury room.)

(At 5:25 P.M. the jury returned to the court room.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?.

The Foreman: Yes, we have.

The Court: Let the verdict be recorded and read.

The Clerk: *United States of America* v. *Wadelmiro Arroyo*, Number 7284 Criminal. Verdict: We the jury find the defendant guilty as charged in the indictment. Signed, Alfonso E. Pena, Foreman.

REQUEST FOR SPECIAL INSTRUCTIONS TO THE JURY

Defendant respectfully requests that in its instructions to the jury this Honorable Court charge as follows:

1. If the jury finds that the defendant, Wadelmiro Arroyo received the checks marked Exhibits 4 and 5 in this case for himself and not for the Union he represented, the jury must bring a verdict against the defendant.

2. If, contrariwise, the jury finds that the defendant received the checks drawn by the employers to the name of the Union, and as such deposited the checks in compliance with the bargaining agreement of February 21, 1953, the jury must bring in a verdict of acquittal.

3. If the jury find that the evidence submitted for and against the defendant bears out the Indictment and prove the defendant violated the specific charge that he did not receive the checks as a payment to a trust fund established by the defendant or any other representative for the sole purpose and exclusive benefit of the employers, the jury must bring a verdict of guilty as charged.

4. If the jury finds that the defendant did receive the checks from the employers for the purpose of establishing thereby and paying into a trust or welfare fund for the benefit of the employees affiliated to the union he represented, the jury must bring a verdict of acquittal.

5. If the jury find that the evidence against and for the defendant bears out that it was the union and not the defendant who did receive the checks for the welfare fund established by the bargaining agreement of February 21, 1953 and as such were deposited, but thereafter defendant acted contrary to the welfare agreement and drew upon the fund and used all or part of the monies for other purposes than stipulated, the jury must not be influenced by the fact that the defendant misused or embezzled the funds and must render a verdict of acquittal under Art. 186 (b) and (d) of Title 29 U.S.C.A.

6. The jury must not decide the case and render its verdict without considering and weighing the evidence in the light of the indictment, and specifically the charge that the defendant did not receive the checks of the employers as payment to the trust fund established by the bargaining agreement of February 21, 1953; and if the jury be in doubt as to whether the defendant received said checks for the specific purpose to which they were destined, or for his own personal enrichment, the jury must give the defendant the benefit of the doubt and render a verdict of acquittal.

Done and Submitted
in Chambers,
February 14, 1957

RAFAEL V. PEREZ-MARCHAND
MIGUEL E. HERRERO FRANK
CARLOS A. ROMERO BARCELO
Counsel for Defendant
Wadelmiro Arroyo

MOTION IN ARREST OF JUDGMENT

The defendant, WADELMIRO ARROYO, moves the court to arrest the judgment for the reason that the indictment as supplemented by the Particulars supplied by the Government does not state facts sufficient to constitute an offense against the United States under 29 U.S.C.A. Section 186 (b) and (d).

At San Juan, Puerto Rico, this 19th day of February 1957.

RAFAEL V. PEREZ-MARCHAND
ROMERO BARCELO &
HERRERO FRANK
Attorneys for Defendant
by: (s) CARLOS A. ROMERO BARCELO
One of the attorneys

MOTION FOR ACQUITTAL "NON OBSTANTE VEREDICTO".

Comes WADELMIRO ARROYO, defendant herein, by his undersigned counsel, and respectfully moves that, notwithstanding the verdict rendered by the Jury in his case, this Court enter a judgment of acquittal of the offense charged in the indictment, as supplemented and limited by the particulars orally submitted by government counsel, on the grounds that:

1. As a matter of law the evidence is insufficient to sustain a Conviction of the alleged offense of defendant against the UNITED STATES, under 29 U.S.C.A. Section 186 (b) and (d).
2. There has been a fatal VARIANCE from the charge of the indictment, as supplemented and limited by the particulars thereof, and the evidence submitted by the Government in this case.
3. The verdict of "guilty as charged in the indictment" returned by the Jury is not supported by the evidence in this case, when read in the light of the indictment, as supplemented and limited by the particulars thereof.

At San Juan, Puerto Rico, this 19th day of February, 1957.

RAFAEL V. PEREZ-MARCHAND
ROMERO BARCELO &
HERRERO FRANK
Counsel for Defendant.

For: (s) CARLOS A. ROMERO BARCELO
One of the Attorneys for Defendant

HEARING ON MOTION FOR ACQUITTAL NON OBSTANTE VEREDICTO

The hearing on the above entitled motion was held before the HONORABLE CLEMENTE RUIZ NAZARIO, United States District Judge, sitting at San Juan, Puerto Rico, at 9:30 in the morning on March 1, 1957, the plaintiff being represented by Ruben Rodriguez Antongiorgi, Esquire, United States Attorney, and the defendant being represented by Carlos Romero Barcelo, Esquire.

Mr. Romero: We filed two motions, one *non obstante veredicto* and the other in arrest of judgment. Does the Court want them to be discussed jointly or separately?

The Court: Well, you discuss them as you wish.

Mr. Romero: First, the motion *non obstante veredicto*, which is as follows—

The Court: You simply argue, don't read it.

Mr. Romero: The first point is that the evidence is insufficient to sustain a conviction of the defendant under the section of U. S. Code Annotated. The law with which we are concerned we very well know, and the sections which are applicable to this case, section (b), "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." And Section (5) of Section (c) which says, it makes the exceptions that the provisions of this section "shall not be applicable with respect to money or other thing of value paid to a trust fund established by such representative," then it mentions how the trust fund shall be established, "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents);" Provided that (a),

"such payments are held in trust for the purpose of paying, either from principal or income or both", then who that shall be paid to, then (b) "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund," and to the persons to whom, and how this fund is to be established.

In other words, if it is a payment between the employer and the representative of the employees, that has several exceptions and the one exception is that that money is paid to a fund established. According to the evidence submitted in this case, the discussion by the District Attorney, has tried to establish the fact that this fund had been established, and therefore the employer had no guilt in this matter, and it was his intention to give this money to this fund, but according to the evidence submitted the fund had not been established yet.

The collective bargaining agreement where they agreed to pay $15,0000.00, the employer, there is made in reference to the future that this fund shall be established. There is no evidence that that fund was ever established according to the requirements of Subsection (5), Section 302 of the Labor Management Relations Act, the same as Section 186, Title 29 of United States Code Annotated.

My distinguished brother then claims that because Wadelmiro Arroyo had exclusive control of this money, because of his condition as president of the union, and for the fact that he had authority to be the only one to draw money from this fund, that therefore he had received the payment according to the requirements of the law.

Let us look at the facts. Wadelmiro Arroyo received two checks made out to the name of the Union. It is a check, an order to pay to the person named therein as payee, or if it is cash or bearer to any person who delivers the

check to the person supposed to pay, usually the bank. In this case, the checks were made payable to the Union, and in the voucher it stated it was for the trust fund which has never been established. Wadelmiro Arroyo and Luis Silvagnoli endorsed the checks and it was for deposit to the account of Union de Trabajadores de Factoria, Refineria y Ramas Anexas de Ponce. That was February 24 when they took the checks to the bank and deposited the checks according to the endorsement on those checks. According to the evidence by the District Attorney the ledger of the National City Bank where the money was deposited had a statement that on February 24th, $15,000.00 were available to the Union. It was a fund opened in the name of Union de Trabajadores de Factoria, Refineria, y Ramas Anexas, $15,000.00 available to the Union February 24, 1953, according to the ledger submitted in evidence by the District Attorney.

Six days later Wadelmiro Arroyo gets an authority to be the only and exclusive one that draws the checks. All the checks submitted by the District Attorney in reference to the money that Wadelmiro Arroyo withdrew are made out by the Union, signed by Wadelmiro Arroyo. The union was the only one that had those funds available; whether Wadelmiro Arroyo as president withdrew the money, the fact that my brother established is that Wadelmiro Arroyo used the money, instead of for the Union, for his own personal benefit.

The fact that Wadelmiro Arroyo uses the money available to the union for his own personal benefit seems to me that it does not fall within this Act. My distinguished colleague has relied on the case of *United States* v. *Ryan* to base the legislative intent when this law was passed. We would like to make a summary of what we believe is the right law, according to *United States* v. *Ryan.*

In this case the defendant filed a motion to dismiss on

the grounds that Ryan was not a representative within the law, a representative of the employees. The facts were that Ryan had received $1,000.00 every December of every year for quite a few years, and then $500.00 in 1951, in April. He had received this money in cash payments. The Court then goes on to say that the representative can be the collective bargaining unit or any responsible individual who has the authority to represent the employees or union in any collective bargaining agreement.

The Court based this decision on the fact that the Labor Management Relations Act provides that the term representative shall have the same meaning as when used in the National Labor Relations Act, as amended by this Act. And the pertinent definitions appear in Section 2 (4) of 29 U. S. Code Annotated and Sections 154, sub-section (4) of the National Labor Relations Act. That representative includes any individual or labor organization. In other words, this case decides that there are two representatives that can be responsible, the individual representative or the collective bargaining representative. Then it goes on to say that the reason they believe this is so is that otherwise the individual representative could not be held responsible "Payments made directly to union officials, or to other individuals as trustees, would apparently be excluded from Sec. 302." That's 100 L. Ed. 276, and it talks about the legislative history, and it says, "The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds, and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization . . .' H.R. 3020, 80th Cong. 1st Sess. Sec. 8(a)(2). The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the Union representative is shaking down the employer . . .'

93 Cong. Rec. 4746." It says obviously the man who is bargaining should have no right to expect any personal advantage. With the words of the section stating "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." Obviously the man who is bargaining can not expect personal advantage. And also Senator Green appeared before the Senate Committee, and that is citing *U. S.* v. *Brennan*, 134 Fed. Supp. 42, and said that apparently it was an attempt to prevent bribery of Union officials.

In other words, what we maintain is that with respect to the trust funds, the intention of the legislature is that the payment from an employer to a union as representative of the employees or any individual representative is all right after the fund is established. If the fund is not established as the evidence in this case shows, that payment is illegal according to the words of the statute, Section 302 of the Labor Management Relations Act. In other words, what we have before us is evidence that the employer, the two employers, Central Mercedita and Puerto Rican American Sugar Refinery, violated the law and so did the union. However, only Wadelmiro Arroyo as the individual representative, and we so read from the indictment which says in paragraph 3 "At all times hereinafter referred to, Wadelmiro Arroyo was President of said Local 1781, the labor union referred to above, and as such was the representative of employees of the Puerto Rican American Refinery, Inc. and Central Mercedita, Inc., as hereinaffer alleged, said employees being engaged in an industry affecting interstate commerce, within the meaning of the Act referred to above."

In paragraph 4, "On or about February 24, 1953, at Ponce, Puerto Rico, within the district of Puerto Rico and

within the jurisdiction of this Court, the defendant, Wadelmiro Arroyo, did wilfully and unlawfully receive from the said Puerto Rican American Sugar Refinery, Inc., and Central Mercedita, Inc., a sum of money in the amount of fifteen thousand dollars which sum was not received by him as compensation for or by reason of his services as an employee of such employers;" and it goes on stating other reasons, "nor was such sum of money received as a payment to a trust fund established by the defendant or any other representative of such employees" and the District Attorney says it was established, already established, "for the sole and exclusive benefit of the employees of said employers, and their families and dependents . . .".

Then I asked for a bill of particulars, and my distinguished brother orally submitted such bill of particulars, saying that the sum of $15,000.00 was received in two checks by Wadelmiro Arroyo, one by Central Mercedita and the other by Puerto Rican American Sugar Refinery made payable to Union de Trabajadores de Factoria, Refineria, y Ramas Anexas de Ponce. If we take that he received $15,000.00 made out in two checks made payable to the Union, and Wadelmiro Arroyo and the secretary of the Union endorsed those checks, deposited them in the bank for the name of the Union, and the Union can draw from those funds, Wadelmiro Arroyo is authorized to be the one to draw in the name of the Union, and he does in the name of the Union, but uses it for his own benefit. We don't see how it can be said that Wadelmiro Arroyo has received a payment of $15,000.00 from the employer. It seems definite and without a doubt that the one that received the payment from the employer was the Union. It was the Union who received payment, and it was the employer who made legal payment and the union received payment. Neither the Union nor the employer were in-

dicted or tried, both have now the statute of limitations that they can not be brought to court now.

Now, Wadelmiro Arroyo, under the authority as president of the Union he has, he drew the moneys and he made bad use of the money. We have nothing good to say for any man who does any act of such a nature. We are not defending anything that he might have done wrong. But we do maintain that technically and legally he has committed no wrong against the statute, and when we read the indictment as it was limited and supplemented by the bill of particulars supplied by the District Attorney, from a mere reading of it, we can say Wadelmiro Arroyo receives two checks for the Union; that seems to be that he did not receive any money, but let's go into the evidence.

Now, he received those checks, endorsed them, and deposited them in the name of the Union for the Union to draw on and he as president drew on. Then the District Attorney also in his argument of the case, and if I am not mistaken I think that the Judge in instructing the jury said that the fact that defendant had not brought forth any evidence of what he had done with the money supplied the lack of the evidence that my distinguished colleague . . .

The Court: No, I did not say that. I told them that they had the right to consider, in commenting on the evidence, that they had the right to consider that there was no evidence that any single cent of that fund was ever used for the purposes contemplated by the statute.

Mr. Romero: And the District Attorney showed that Wadelmiro Arroyo had used a sum, not anywhere close to $15,000.00. The reasons that we did not bring any evidence of what Wadelmiro Arroyo did with the money is because we hold, and have held throughout the case, that that evidence is irrelevant and immaterial, and that the fact that he used that money for whatever purpose has no bearing because this is a case of payment and receiving

What Wadelmiro Arroyo did, the way he managed the funds, is no concern to us in this case. We are concerned with whether it was a legal payment and a legal receipt, and when the District Attorney makes an assertion, an indictment, asserts that a person received $15,000.00, it seems to me that the Government must prove the case prima facie. There has been no prima facie proof of the fact that Wadelmiro Arroyo received $15,000.00. If we were to produce the evidence of what Wadelmiro Arroyo did, we would be opening the doors to what we have called a fatal variance. We would have renounced our legal conviction of what the law reads, and how the indictment is to be read.

In *Words and Phrases*, Volume 27, page 290 it says that misappropriation and embezzlement are synonymous. We are not considering here under this statute—we are not considering misappropriation or embezzlement. This statute is a *malum prohibitum*. It was made with such provisions so that the Anti-Racketeering Act had no flaw, that to prove extortion there must be an act against the employer. They couldn't prove it because the employer was still being extorted, and would not testify, so that they just had to prove payment, and the receipt was illegal, so here's a clear case where a check is made to a Union and the check is deposited and made available to the Union in the bank, according to the ledger of the National City Bank, that fund was there in the Union's name, and was available from February 24th.

Then Wadelmiro Arroyo gets authorization—whether that authorization was legal or not, whether the authorization was correctly obtained by Wadelmiro Arroyo is of no concern to us. Wadelmiro Arroyo withdrew from the funds, whether authorized or not, if not authorized he was stealing, if authorized, he misused the money and it was misappropriation or embezzlement, but I think this isn't

a matter of playing with words, but you could not say he had received $15,000.00 when the proof is he withdrew under his authority as president, he withdrew money, not close to $15,000.00, and the indictment claims $15,000.00.

Further, we want to talk about the interpretation of the criminal statute, that the criminal statute must be interpreted in a strict way. When a crime is *malum prohibitum* when it is not immoral, as this crime is according to the case of *United States* v. *Ryan* which I have already read, it is when a crime is merely *malum prohibitum*, not *malum in se*, the words of the statute must be clear, because the person is not, can not have any guilty feeling of doing a wrong act, but it is one prohibited by law, and the law must be clear, must be explicit. In the case we have already cited, *United States* v. *Universal C.I.T. Credit Corporation*, 344 US 218, Justice Frankfurter says, "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

Cardozo, in writing about the nature of judicial process, the book of his selected writings, Benjamin Nathan Cardozo, in Fallon Publications of 1947, page 160, says "Judges have, of course, the power though not the right to ignore the mandate of a statute and render judgment in despite of it. They have the power but not the right to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power they violate the law." It seems to us, we all worked together, that the law in this case talks about payment and receiving. We are not trying to bring in a mere play of words, and we are convinced that a person receives when something is given to

him, and he accepts. But when a person takes from what belongs to a third person, in this case the Union, he is not receiving. He is taking unlawfully. He has not received from the employer, because the employer paid to the Union. In the law of negotiable instruments, when an instrument is made out to a person who exists, and the intention as was shown in the testimony of Mr. Goyco and Mr. Aragon that the money is to a Union trust fund, the intention is that the person receives the money, that is, to whom the money is paid, the money is received by the Union and so deposited in the bank. Then, one of the officials makes bad use of that money, because he has authority to withdraw the money available to the Union, he withdraws it and uses it for his own benefit. As I said before, we don't condone these acts. We don't say he was right in doing so. Merely that it does not fall under this law. He has been accused in the local courts for that, and that's where he should be accused for those acts.

Then the District Attorney indicts him for having received $15,000.00, and proves that he withdrew and made use for his own benefit of an amount which does not reach $15,000.00, and then he says we can imagine the rest. He must prove his case prima facie. He must show at least, to give the Court and jury, he must show he used $15,000.00, that he received under his theory. He should have at least shown he used $15,000.00, since he was charging him for having received $15,000.00.

With respect to what the jury rendered a verdict, he is guilty as charged in the indictment. The jury was following the exact words of the indictment and says he is guilty as charged, guilty of having received two checks made payable to the Union, of $15,000.00, and that amount of money was not received in payment of the exceptions listed, it is a negative indictment, and they say guilty.

The Court: I don't want you to continually repeat all

the arguments you made in the motions, because we will be here for hours.

Mr. Romero: And we believe, as we say in the second paragraph of that motion for acquittal, that there has been a fatal variance between the indictment and the evidence submitted by the United States Attorney in this case, The U. S. Attorney has submitted evidence of misappropriation, of having—

The Court: I already passed on that, Mr. Romero.

Mr. Romero: So, Your Honor, we have covered most of the aspects and we want again to talk about the intent of Congress. And we wish to say that Congress's intention seems clear in the words of Senator Taft and Senator Green, that this was an Act passed to prevent the extortion of employers by employees, and it was an act also which prevented bribery, a sweeping prohibition which made it *malum prohibitum*, the payments by an employer to a representative of the employees and the receipt by the representative of the employees from the employer.

On page 276, 100 Lawyers' Edition, in the *Ryan case* it says that payments made direct to union officials—direct payment, there has been no direct payment shown in this case. We believe sincerely there has not been even a payment to Wadelmiro Arroyo. The extortion and bribery were even set aside by the act that made it. With a payment you don't have to prove the intention, that it was bribery or extortion. The Act covered any payment to a fund established. The fund was never established as we read the requirements of the establishment of the fund. It was an illegal payment by the employer and an illegal receipt by the Union. Wadelmiro Arroyo, as an individual representative, did not receive any money. The Union illegally received $15,000.00, and the employer illegally paid $15,000.00. The money was made available to the Union. Wadelmiro Arroyo as president with power and

authority to do so, withdrew for his own use it is true, but that does not mean he received it. The Labor Management Relations Act is the relations between the employer and Union or any representative. There was no connection of Wadelmiro Arroyo's act, no direct connection with the employer's act. I think I have covered every aspect, and thank Your Honor for being patient and listening to us again.

Mr. Rodriguez Antongiorgi: May I ask the Court, I think this is the fourth time that we have argued the Government's theory and the defendant's theory before Your Honor, and I don't think anything has been added. The first time was when a motion was filed to dismiss, and Your Honor left the matter pending until the trial proper, then the motion was filed after the Government's evidence was in, and we had arguments for hours on this, then the motion was filed after the verdict, or after the defendant's evidence came in, and we had more argument. Now we have the same arguments, and I sincerely and frankly don't see that anything new has been added to the arguments on all those occasions by Mr. Perez Marchand, Mr. Romero and myself.

Now, reliance is placed on the legislative history, precisely what I claimed, that the legislative history is what supports the Government's theory in this case; precisely because of the legislative history of this Act it was that the Supreme Court in a unanimous opinion reversed Judge Frank from the Second Circuit and precisely relied on the legislative history, when it was that the Supreme Court in the *Ryan case* propounded the dictum referring to welfare funds, which I have maintained before this Court squarely covers the situation in this case. Now, it has been said that there was no fund established. I don't see, frankly, how that can be argued. It was proved here in a very clear way that a fund was established through the collec-

tive bargaining agreement. The defendant himself signed it representing the Union, and the fund was under that clause of the agreement. Pursuant to the fund, those checks were issued.

The Court: If the fund was not established, so much the worse for the defendant. Then it is a question it was simply a scheme to get the money from the employer.

Mr. Rodriguez Antongiorgi: Correct. No matter how we view it, we have covered that on several occasions, the question whether this becomes an illegal payment or is covered by the statute.

If we view it as the exception of the statute, if in the indictment this isn't the type of case as the *Rijan* or *Mejias case*, and in that we did not allege the exceptions, but in this case we allege all the exceptions but of course the one that refers to this case is the one covering the welfare fund; but by negativing those exceptions we bring in issue the question of whether those $15,000.00 were received by him in violation of the statute. And, of course, all the argument that I am repeating again, that if we were to interpret this Act the way the defendant has been urging before this Court, then there would be a complete frustration of the intent of Congress. In other words, that would be contrary to what Mr. Romero just argued, that the intent was to make a sweeping prohibition, in which I agree. That was precisely the intent of Congress in passing the Taft-Hartley Act, to make a sweeping prohibition in all the relations between employer and employees in their dealings. I have no other arguments except to refer to the other arguments that I presented here during the course of the trial, on many other occasions, and I submit that.

Mr. Perez Marchand: May I be allowed a short reply?

The Court: Mr. Perez Marchand, if you are not going to bring me any new matters, and so far I have not heard

a single argument not raised several times during the trial, you must realize it is almost 12:20. I have been hearing you for almost 45 minutes. And of course, if you are not going to bring any new points—

Mr. Perez Marchand: I hope that I am going to bring up two points.

The Court: Five minutes to bring those points.

Mr. Perez Marchand: I will use the five minutes to say that according to the legislative history of the law here interpreted by the Judge and converted into a verdict of guilty by the jury, there must be before the Court a two tone situation, to wit: Under Section (a) there must be a showing that a bribery has been committed by the employer under Section (b), there must be a showing by the Government that an extortion or blackmail has been perpetrated by the defendant.

Dwelling upon the interpretation of Section 302, Professor Forkasch of the Brooklyn Law School at page 584 says that "The section was meant to make unlawful for the employers to pay by way of favor" meaning bribery "and that it would be illegal and criminal for the representatives of labor to receive anything, any money or thing of value, with the violator subject to charge and imprisonment for the exaction." In a note to page 585, this authority reads, "That the House Committee on Education and Health and Labor discussing the aspects of section 882 (c) relative to secondary boycotts went further to consider the unfairness of exacting money from the employers by the leaders of the employees."

The Court: Well, there is no question about that.

Mr. Perez Marchand: And it says that in order to be processable criminally, and prosecuted and convicted under Section 302 (a) or (b) when the case is against the representative it must be shown that there was an exaction from the representative toward the employer; exac-

tion according to the best judicial definition is nothing else than an extortion, and an extortion is a case of blackmail. We consider new and of great weight the point that under the law, and according to the authority of the *Ryan case* by way of reference to the legislative history, a case of extortion must be shown before a conviction can be obtained.

The Court: In a case of extortion, intent is required and here the Supreme Court has said no intention is required, but it is a *malum prohibitum*.

Mr. Perez Marchand: According to the words of Senator Taft in the Committee, on the contrary, and discussing on the 8th of May 1947 at 11:00 in the morning, he tells the president-chairman of the Committee what his intention is, when he wants this new amendment to come by way of innovation to make the law in some way capable of avoiding the shakedown. And he says that it must be a case of extortion or a case where the Union representative shakes down the employer, obviously bargaining under color of right for a favor. Now—

The Court: The five minutes have already passed.

Mr. Perez Marchand: It does not mean that he must have the intention. The mere fact that he receives something which is not due him, and that's what it means when it says *malum prohibitum*. He practices something which is illegal, but something which before the amendment could not be punished criminally, all that the Union could do was to bring a case of unfair labor practice, the mere fact of the unfair labor practice converts itself into a case of obtaining money under extortion. The *Ryan case* is the best proof of it. Mr. Ryan—

The Court: I have already heard all about Mr. Ryan here.

Mr. Perez Marchand: My Ryan received what was considered an extortion, and we submit the case on the final

proposition that for the record this man, the defendant was charged with the fact of having received a sum of money contrary to sub-section (b) of Section 302 of the Act. We contend that under the terms and according to Section 302 sub-section (b) the man received lawfully and legally.

The Court: Well, I am going to pass on the first argument. One of the last arguments made here was that this statute is designed to prove extortion or bribery; that the criminal interpretation of the statute would be that unless there is bribery or extortion then there is no crime committed, and it has been said that what the statute wanted —that's the argument of Mr. Perez Marchand, was to permit charges of something which otherwise could not be punished.

Then that's contradictory, because if what the statute requires in sub-section (a) is bribery, bribery can be punished and there is no need for the statute. If in (b) what the statute means is that extortion should be prohibited, well, that's something that could be punished without the need of the statute. That means that the intent of Congress was different.

The words of Senator Taft, what they mean practically is that the advantage should not be taken from the employers by the representatives of labor or by the Unions and other statements is that it was to avoid that the employers through personal favor control the Unions.

As to legislative history, Mr. Romero was stating that one of the purposes was to avoid that a labor representative should take personal advantage. Well, precisely that's what happened here, taking personal advantage. Mr. Arroyo took personal advantage of his position, and of all these technicalities. If we disregard all technicalities, all that happened in this case was this. That this man who was the representative of the Union, the bargaining

agent, extorted money from the employer through a scheme to create a welfare fund, which he had never thought of creating and had never thought of establishing. Whether this was done by inserting a clause in the collective bargaining agreement for the creation of the fund with the intention of having the same created on his part, and through checks, another technicality, issued to the order of the Union, when he knew that he was going to be the only man who was going to be able to draw from those funds, so that if we eliminate that, let us assume that the employer would have told him "All right, here are the $15,000.00 cash. We deliver them in a bag to Mr. Arroyo as president of the Union. This money is for the Union." And Wadelmiro Arroyo would have placed this money in an iron safe of which he had the only combination, he was the only one who had the combination of the safe, and from which he could withdraw money at any time at his own whim. That's precisely what happened. Checks or no checks, clause or no clause, the naked facts are that this defendant, through some scheme of his and for his personal advantage, received $15,000.00 from the employer, and he was a labor representative. . . .

We must be realistic. We can not depend upon technicalities or the play of words or anything else. If the Court were to construe the statute in the way the defense wants the Court to construe it, then the intention of Congress would be absolutely frustrated, because then it would be very simple for the employer to say, "Well, we are going to bribe this labor leader", or the labor leader may say, "We are going to extort from the employer." All he needs to do is have a bargaining agreement with a clause or providing for a welfare fund, checks issued in this and that form, and then that's a plant. All that may happen, and then he says, "Oh, no, no, the Federal Courts have nothing to do with it. This isn't a violation of that statute. We will

take care of this in the courts of the State." And of course "because we have influence and we can exert pressure, etc. it is very difficult that we get prosecuted in our own courts."

That could not have been the intent. If the Court were to construe this section in the way the defense wants it construed, the whole section would be bungled. I believe in the States they have a lot of labor relations experts, you would see the law governing collective bargaining agreements with a lot of clauses, time conditions, etc., but the actual disposal of the fund would be let loose in some way to be grabbed by labor representatives. Then the employer would say, "Oh, no, no, I insist that this fund be administered in this way", and the Union would say, or the representative would say "it was for the Union, it was established for that, and if I stole that from the Union, it is a different thing."

If that construction were given by the Court to this statute, not a single case would be brought under the statute against any employer or labor representative because then the Court would be convalidating all these schemes designed precisely for violating the law.

The defendant has not advanced any other grounds not already amply covered by the Court in its rulings during the trial as to this question, and the motion for acquittal *non obstante veredicto* filed by the defendant on February 19, 1957, as well as the motion in arrest of judgment filed on the same day are denied. Imposition of sentence as to defendant is postponed until a presentence report is filed. The Court makes a special request to the Probation Officer to expedite the preparation and presentation of this presentence report.

NOTICE OF APPEAL.

To the Clerk of the U. S. District Court for Puerto Rico.

Please take Notice:

1. That appellant's name is Wadelmiro Arroyo, and his address is No. 8, Castillo Street, Ponce, Puerto Rico.

2. That appellant's attorneys are Messrs. Rafael V. Perez-Marchand, whose mail address is P.O. Box 505, Rio Piedras, P. R.; Miguel E. Herrero Frank and Carlos A. Romero Barcelo, whose address is P.O. Box 1278, Rio Piedras, P. R.

3. That appellant was charged with the unlawful receipt of Fifteen Thousand Dollars ($15,000.00) in violation of Section 186(b) and (d) of Title 29 of the United States Code.

4. That his trial was held from February 12 to February 14, 1957, when a verdict of "guilty as charged" was entered by the jury; and on April 12, 1957, judgment was entered against appellant, who was thereupon sentenced to: "Confinement for nine months in such institution as the Attorney General of the United States shall designate, and to pay a fine of Two Thousand Dollars ($2,000.00)."

5. That not being in conformity with the said judgment and sentence, the above named appellant, Wadelmiro Arroyo, by his undersigned counsel, hereby appeals to the United States Court of Appeals for the First Circuit from the above stated judgment and sentence.

At San Juan, Puerto Rico, this 17th day of April, 1957.

Romero Barcelo &
Herrero Frank
Attorneys for Appellant.

by: (s) R. V. Perez-Marchand
One of the Attorneys

STATEMENT OF POINTS UPON WHICH DEFENDANT-APPELLANT INTENDS TO RELY.

Now comes the defendant-appellant in the above entitled case and in accordance with Rule 24(2) of the Rules of the United States Court of Appeals for the First Circuit, hereby states the points on which he intends to rely, as follows:

The United States District Court erred:

1) In its denial of Motion to Dismiss the Indictment against Wadelmiro Arroyo, the defendant in said Court.

2) In its denial of Motion to Challenge the Array (Impugning the Petit Jury) in the above entitled case.

3) In allowing the U. S. District Attorney, during his opening statement to the Jury, to dwell on facts foreign to the indictment and to the nature of the cause before the Court, ignoring defendant's objection to the fatal variance between the charges made and the evidence offered to support same; and thereafter allowing the U. S. District Attorney, during trial, to submit evidence of embezzlement in support of his charges under—Section 186(b) and (d), Title 29, U.S.C.A.

4) In allowing irrelevant, immaterial and prejudicial evidence of embezzlement to be brought before the jury in obvious disregard of the terms of the indictment and against the objection of counsel for the defense.

5) In permitting the U. S. District Attorney, notwithstanding objection of counsel for the defendant, to submit immaterial, irrelevant and prejudicial documentary evidence in violation of the best evidence rule.

6) In denying defendant-appellant's Motion for Acquittal, at close of the Government's case.

7) In denying defendant-appellant's Motion for Acquittal before the case was submitted to the jury.

8) In denying the special instructions to the jury requested by counsel for defendant-appellant.

9) In allowing the special instructions to the jury requested by the U. S. District Attorney.

10) In charging the jury to consider evidence of embezzlement contrary to the letter of the Statute, under which defendant-appellant was indicted.

11) In denying the Motion for Acquittal "Non obstante Veredicto".

12) In denying the Motion in Arrest of Judgment.

At San Juan, Puerto Rico, this 17th day of June, 1957.

CARLOS A. ROMERO BARCELÓ
MIGUEL E. HERRERO FRANK
RAFAEL V. PEREZ-MARCHAND
by: (s) RAFAEL V. PEREZ-MARCHAND
One of counsel for
defendant-appellant

SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
AUG 1 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. **246**

WADELMIRO ARROYO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1958

No.

WADELMIRO ARROYO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on June 25, 1958.

Opinions Below.

No opinion was rendered by the United States District Court for the District of Puerto Rico where the case originated. The opinion of the Court of Appeals of June 25,

1958 is not as yet officially reported; it is printed in Appendix A hereto (pp. 11-17, *infra*).

Jurisdiction.

The judgment of the Court of Appeals was entered on June 25, 1958 (R. 273).[1] On the petitioner's application under Rule 22 (2) for an extension of time within which to petition for certiorari, filed and acted upon July 24, 1958, petitioner was granted until August 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Sections 302 (b) and (d) of the Taft-Hartley Act, so-called, make it a federal crime ". . . for any representative of any employees . . . to receive or accept . . . from the employer of such employees any money or other thing of value." Section 302 (c) provides that (b) "shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees . . ." The principal question presented by this petition is—

Is it improper to extend the scope of § 302, a criminal statute, into the area of misappropriations from union welfare funds, and to sustain a conviction thereunder for receiving money from the employer, principally on the strength of evidence of subsequent misappropriation of such money originally paid and deposited in the name of a union welfare fund?

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[1] Reference is to the Certified Copy of the Record Appendix which contains the record of the Judgment of the Court of Appeals. All other references are to the copies of the Record Appendix in the Court below filed with this petition.

Statute Involved.

Sections 302 (b), (c) and (d) of the Labor Management Relations Act, 1947, 61 Stat. 157, also popularly referred to as the Taft-Hartley Act, 29 U.S.C. § 186 (b), (c) and (d).

The full text of Section 302 is printed in Appendix B (pp. 18-20, *infra*).

Statement of the Case.

The petitioner was indicted on January 26, 1955 and charged with receiving money from employers in violation of § 302 (b) and (d) of the Labor Management Relations Act, 1947, 61 Stat. 157; 29 U.S.C. § 186 (b) and (d) (R. 3-4). He was tried by jury in the United States District Court for the District of Puerto Rico, convicted and sentenced to imprisonment for nine months and to pay a fine of $2,000.00 (R. 2). The Court of Appeals affirmed the conviction (App. A, *infra*). The petitioner is presently at liberty under bond.

The petitioner was for some years the President and principal bargaining agent of the "Union de Trabajadores de Factoria, Refineria y Ramas Anexas de le Industrial Azucorera, Local 1781, Afiliada a la I. L. A." (hereinafter called the Union) (R. 43). The Union was the bargaining agent (R. 43) for appropriate units of employees of two allied corporations—Central Mercedita, Inc., and Puerto Rican Sugar Refinery, Inc. (hereinafter called the employers). The employers were and are engaged in the production of sugar for movement in interstate commerce (R. 43).

On February 21, 1953, the Union and the employers, after a bargaining session in which the petitioner was the chief negotiator for the Union, entered into a collective

bargaining agreement for the years 1953-1955 (R. 44, 46). Article (6) of that agreement (R. 26) pertained to a welfare fund and provided that the employers should contribute $15,000 to the fund to provide medical care, hospitalization, etc. for the workers and their families and dependants. The fund was to be administered by a committee to be appointed by agreement between the Union and the employers.

Two checks in the amount of $7,500.00 each and payable to the Union (R. 27, 29) were delivered by the employers to the petitioner (R. 46, 165, 172). Each check so made out had a voucher attached showing that it represented the employer's contribution to the welfare fund (R. 28, 30). The checks thereafter were endorsed by the petitioner and by Luis Silvagnoli, secretary of the Union (R. 114, 27, 29).

On February 24, 1953, the checks were deposited by the petitioner in the National City Bank in Ponce (R. 67) in an account in the name of the Union specifically designated as a Welfare Fund ("Plan de Beneficencia") (R. 77). A welfare fund for these employees had first been established in 1951 or 1952 (R. 52, 58) with a deposit in the Banco de Ponce in 1952 (R. 51, 60). As to this prior fund,[2] the practice had been to have checks for benefits signed by the petitioner and countersigned by the employer representative (R. 52).

On or about March 2, 1953, there was delivered to the National City Bank a Union resolution authorizing the petitioner to draw against the account over his signature only (R. 113, 67, 68). The evidence is conflicting as to who signed the purported resolution (R. 114-115, 166). Some days thereafter the petitioner drew against the welfare

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[2] Although the record is not completely clear (R. 51, 52, 58, 60), it would seem that there was only one prior fund. Cf. opinion of Court of Appeals (p. 13, *infra*).

fund account and evidence was introduced to show that the withdrawals were not for welfare fund purposes (R. 76, 95). At no time did the employers' representative countersign such checks although he made efforts to participate in the administration of the fund (R. 51-53).

On March 26, 1953, the petitioner closed out the account in the National City Bank and received a manager's check in the amount of $9,813.89 being the balance remaining (R. 68-69) which was deposited on the same date in the Banco de Ponce in the name of the Union (R. 79). This account had no reference by name to the welfare fund and the petitioner was the only person authorized to draw against it (R. 79). The petitioner drew checks from this account and evidence that such withdrawals in April, 1953 were not for the specified welfare fund purposes was admitted (R. 83, 87-88, 91, 97-98).

The District Court in overruling petitioner's several motions for judgment of acquittal (R. 159, 192-193, 261) and the Circuit Court in affirming, both rejected the petitioner's contention that the evidence showed no receipt by him from the employer, but only an exempted payment and deposit to and in the name of a welfare fund. Subsequent unauthorized abstractions from such fund, while possibly presenting a question of insular criminal law (cf. R. 20), were not within the scope of Section 302 on which the indictment was based. Both Courts, instead, adopted the prosecution's theory that evidence of the subsequent withdrawals could be admitted and used to show that the fund had no reality so as to break (or exempt) the flow of money from the employer to the petitioner.[3]

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[3] The employer, by contrast, had indicated his belief in the reality of the fund, not only by his efforts to participate in its administration (R. 51, 53), but by inquiring as late as May 4, 1953 (R. 110-111) with regard to petitioner's actions with respect thereto.

Reasons for Granting the Writ

1. The decision below was erroneous. The effect was to subject the petitioner to criminal liability under § 302 of the Labor Management Relations Act, 1947 for alleged actions which were outside the scope of that Act, and which, in substance and at the most, constituted a possible embezzlement of the funds of the union, a wrong not within the purview of § 302. The ruling sustaining the conviction constituted judicial legislation which was improper under established principles of construction of criminal statutes in general and of this section in particular.

(a) There can be little dispute that in § 302 Congress was not intending to cover the subject of appropriation of union funds for personal use. The legislative history at the time of enactment of the Taft-Hartley Act shows that the Congressional concern was over the use of large sums involved in welfare funds for *union* purposes (albeit unconnected with welfare), and not with their possible diversion to completely non-union purposes. (See: *United States* v. *Ryan*, 350 U.S. 299, 304 (1956)).

The subsequent legislative history is even more striking on this point. One of the most important concerns of the current (Eighty-fifth) session of Congress has been the question of preventing misuse of such funds by union officials.[4] As a result of extended hearings, the Kennedy-Ives Bill has been introduced to that end.[5] That Congress

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[4] N. Y. Times, March 25, 1958, p. 1, col. 8.

[5] S. 3974 (passed by Senate June 17, 1958), § 109 (a):

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another any of the moneys, funds, securities, property, or other assets of an organization which is exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 of which he is an officer or by whom he is employed directly or indirectly shall be fined not more than $10,000, or imprisoned for not more than five years, or both."

found it necessary to legislate expressly against conduct of the sort relied upon by the government here to sustain the conviction is, of course, a strong indication that such conduct was not and is not considered by Congress as being within the scope of § 302. *Bailey, Collector,* v. *Clark et al,* 21 Wall. (88 U.S.) 284 (1874); 2 Sutherland, *Statutory Construction* (3rd Ed.), § 5110.

(b) The conviction can be sustained only on the theory (clearly erroneous, (a), *supra*) that the Act covers peculation involving union funds. The government's argument that the requisite "receipt from the employer" was involved because the trust to which the money was paid, and from which it was withdrawn, in form and in fact (Statement, p. 5, *supra*) had no reality, rested on the sole proposition that the subsequent taking of monies from the fund by the petitioner could be admitted to show that it never had had any prior independent legal significance.

But the vice of this approach is two fold: (1) By justifying the introduction of evidence of other alleged wrongdoing, conviction is assured (whether or not on the ground on which the indictment was founded)[6]; (2) the argument proves too much. If such evidence of subsequent conduct can be admitted, then logically the government can range into any period to sustain conviction even though the statute in terms deals with a specific event ("receive"). Thus, in the instant case, although the indictment specified only a single date, February 24, 1953 (R. 3), the government relied on actions of the defendant taking place in subsequent months.

One other consideration emphasizes the fallacy of the reasoning of the courts below. If petitioner's subsequent

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[6] Although such evidence is normally rejected (1 Wigmore, *Evidence* (3rd Ed.) p. 646), the government here had no case without it, as both courts below recognized (R. 145, 148-9 App. A. p. 16).

withdrawal showed that the trust was bogus *ab initio*, then the employer automatically became equally guilty with petitioner (under sub-section 302 (a)). But the employer was not indicted (R. 16), presumably because the prosecution recognized that it could not push this line of reasoning to such an extreme.

In sum, the reasoning of the courts below only served to cloak the fact that the petitioner was convicted for conduct that was not and could not be charged in an indictment based on § 302.[7]

(c) It is clear that whether or not the Court below in effect treated § 302 as covering embezzlement of welfare funds, its construction of the Act which made the conduct here a violation, was improper. The opinion, in countenancing the use of evidence tending to show petitioner's violations of other laws in order for the prosecution to make out a case, went beyond what the specific words of § 302 (b) would permit, in violation of principles of fundamental fairness and of strict construction of criminal statutes in general (*United States* v. *Wiltberger*, 5 Wheat. (18 U.S.) 76, 95-96 (1820) (Marshal, C.J.)), and of § 302 in particular.[8]

2. The question is of great and growing importance in the administration of the Act and in the field of oversight of these funds.

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[7] Petitioner in no sense argues that a bribe to a union representative can be insulated from the Act by casting it in the form of a payment into a welfare fund. If the receipt by the representative *and the payment by the employer* are intended to be a subterfuge, the statute applies. Such is not the present case, since all the employer witnesses' statements and the inferences from their conduct (by which the government is bound) indicate that they genuinely intended the creation of a welfare fund pursuant to the collective bargaining agreement (R. 51; 107-9).

[8] *United Marine Division* v. *Essex Transportation Co.*, 216 F. 2nd 410, 413 (3rd Cir. 1954); *Ventimiglia* v. *United States*, 242 F. 2nd 620, 623-624 (4th Cir. 1957).

That the area dealt with by § 302 is of sufficient importance in the administration of the Act to warrant certiorari, has been previously recognized by this Court. *United States* v. *Ryan*, 350 U.S. 299, 300 (1956). The current concern of Congress with the subject of maladministration of welfare funds for personal benefit evinces not only the error of the courts below (point 1(a) *supra*), but the importance of the central question raised by this case.

Union welfare funds in the aggregate involve billions of dollars and blanket virtually all sections of the economy (New York Times, January 6, 1958, p. 83, cols. 3, 4). As far as the petitioner can determine, the present is the first and only case to attempt to found a conviction upon § 302 for what was in form a taking from such a fund. If the affirmance of conviction stands uncorrected, it may well be expected (in view of the testimony taken by Congress) that numerous other prosecutions under § 302 would be essayed by the government regardless of whether the Kennedy-Ives bill succeeds of passage. Conversely, if the petitioner could rightly be indicted under section 302, as he cannot be, a ruling by this court to that effect would obviously be of great value and importance to Congress.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 5261.

WADELMIRO ARROYO,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Before MAGRUDER, *Chief Judge*, and WOODBURY and STALEY, *Circuit Judges*.

Rafael V. Perez-Marchand, with whom *Carlos A. Romero Barcelo* and *Miguel E. Herrero Frank* were on brief, for appellant.
Ruben Rodriguez Antongiorgi, United States Attorney, with whom *John M. Gallagher*, Attorney, Department of Justice, was on brief, for appellee.

OPINION OF THE COURT.

June 25, 1958.

WOODBURY, *Circuit Judge*. The appellant was indicted, tried by jury on his plea of not guilty, convicted and sentenced in the court below for receiving money from an employer in violation of § 302 (b) and (d) of the Labor Management Relations Act, 1947, 61 Stat. 157; 29 U.S.C. § 186 (b) and (d) quoted in the margin,[1] with so much of subsection (c) as has any application here.

[1] "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

The Government introduced evidence at the trial to show that on February 21, 1953, Central Mercedita, Inc., and Puerto Rican Sugar Refinery, Inc., allied corporations engaged in Puerto Rico in the production of sugar for movement in interstate commerce, executed a collective bargaining agreement for the years 1953 through 1955 with the Union de Trabajadores de Factoria, Refineria y Ramos Anexas de la Industrial Azucarera, Local 1781, Afiliada a la International Longshoremen's Association (hereinafter for brevity referred to as the Union), as the duly certified representative of appropriate units of their employees and that the agreement was negotiated and executed on behalf of the Union by the appellant as the Union's president and principal negotiator. Article 6 of the agreement provided that the employers would contribute equally to a welfare fund of $15,000 to be used to furnish medical aid, hospitalization etc. for the employees of the employers and their families and dependents which was to be administered by a committee to be appointed by agreement of the parties. On the day the agreement was signed, or the day following, the evidence is conflicting, each employer gave the appellant its check in the amount of $7,500 payable to the Union, each check having a voucher attached showing that it covered the employer's contribution to the welfare fund established under the collective bargaining agreement.

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents): . . .

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

On February 24, the appellant, instead of depositing the checks in the Banco de Ponce to the credit of the Union's welfare fund to be withdrawn by checks signed by him and counter signed by a representative of the employers, as had been the practice with respect to previous similar funds, used the checks endorsed by himself and the Union's secretary to open a new account in the name of the Union's welfare fund in the Ponce branch of the National City Bank. A week or so later the appellant gave the bank what purported to be a resolution of the Union giving him authority to draw against this account over his signature only, and subsequently, beginning on March 6 he made withdrawals from the account for his personal benefit, as for the purchase of an automobile. The employers protested as soon as they discovered what was afoot and on March 26, 1953, the bank closed out the account by giving the appellant a manager's check for the balance remaining on deposit of $9,812.89. The appellant deposited this check to the Union's general account in the Banco de Ponce, on which he was the only person authorized to draw, and he drew against it for his personal use and general purposes of the Union. There is no evidence that any part of either account was used for the welfare purposes specified in Article 6 of the collective bargaining agreement.

There can be no doubt that the two corporations involved, Central Mercedita, Inc., and Puerto Rican Sugar Refinery, Inc., are "employers" within the meaning of the statute. Nor can there be any doubt that the appellant was a "representative" of the employees of those employers as that term is defined in *United States* v. *Ryan*, 350 U.S. 299 (1956). The basic question presented is whether the appellant can stand convicted on the facts outlined above.

The appellant contends that having accepted checks from the employers payable to the Union's welfare fund, and having deposited those checks in a bank to the credit of that fund, he cannot in reason be said to have "received" himself any "money or other thing of value" from the employers. He concedes that through the personal control he possessed over the welfare fund he not only could but did use it for his own personal expenses, but he says that while he may thereby have violated the local criminal law, the monies he received came from the Union, not from the employers. Thus he contended throughout the trial and contends here that the evidence of his misappropriations was not only irrelevant but also highly prejudicial and should have been excluded. The Government on the other hand contends, and the court below adopting the contention so charged the jury, that even though the checks were made payable to the Union's welfare fund and were so deposited, nevertheless, if by collusion with other Union officials or by more devious means, the appellant in fact possessed complete and sole control over the fund so that he might use all or part of it for his own personal benefit in violation of the collective bargaining agreement and the law, he "received" money from the employers in violation of the statute. We agree with the view of the Government and of the District Court.

One obvious purpose of subsection (b) of the statute is to discourage by the imposition of criminal sanctions representatives of employees from shaking down employers. But this is not its only purpose. The statute is not limited in its thrust to cases of extortion. By subsection (b), read with subsection (a) which imposes similar sanctions upon employers for paying or delivering, or agreeing to pay or deliver any money or other thing of value to any representative of his employees, Congress, in the words of Chief Judge Learned Hand dissenting in *United States*

v. *Ryan*, 225 F.2d 417, 426 (C.A. 2, 1955), "wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers." This, however, is not all, for the statute read literally prevents even the creation of a relaxed and friendly atmosphere for collective bargaining by the device of gifts or presents passing from employers to the representatives of their employees. From its use of language it seems evident that Congress wished to assure collective bargaining at arms length except, of course, for a possible friendly atmosphere born of mutual trust and confidence.

To achieve this purpose subsections (a) and (b) of § 302 read broadly to make it illegal, with the five exceptions listed in subsection (c), "for any employer to offer, or any representative to accept, money or other thing of value." *United States* v. *Ryan*, 350 U.S. 299, 303 (1956). "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." *Id.* 305. We may safely assume that Congress spoke in sweeping terms designedly in order to prevent circumvention of the statute by subtle and devious devices. And one of the devices for circumvention in the mind of Congress when it enacted the section was the creation of spurious union welfare funds. The legislative history clearly shows that "In 1946 Congress was disturbed by demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit." *United States* v. *Ryan*, supra, 304. See also the legislative history cited and quoted at length in the same case in the Court of Appeals, 225 F.2d 417, 422 *et seq.* (C.A. 2, 1955), and in *United Marine Division etc.* v. *Essex Transportation Co.*, 216 F.2d 410, 412 (C.A. 3, 1954).

Moreover, the statute does not require mutuality of guilt for the conviction of either the employer or the representative of employees. An employer would be guilty under subsection (a) if he paid or delivered any money or other thing of value to a representative of employees even though the latter repudiated the gift by returning the money or thing tendered. Likewise a representative of employees would be guilty under subsection (b) if he received money or other thing of value from an employer unless the receipt were covered in the exceptions stated in subsection (c). Thus we are not here concerned with the employers' guilt. There is no occasion to express any opinion on their conduct. The question is whether the appellant "received" the checks on behalf of the Union for its welfare fund to be administered according to the terms of the collective bargaining agreement, or whether he accepted the checks for a bogus welfare fund, *i.e.* one over which he in fact had complete and sole control in violation of the collective bargaining agreement, for in that event he did not "receive" them under any of the circumstances permitted by subsection (c) of § 302 of the statute.

The jury answered this question in favor of the Government, as it might well have done on the basis of the evidence of the appellant's conduct in obtaining sole personal control over the fund and then in withdrawing from it for his own personal expenses soon after he deposited the checks in the Ponce branch of the National City Bank. The competency of the evidence of his withdrawals from the fund for his personal expenses to show his complete and sole control over the fund is too obvious to call for demonstration or the citation of authorities.

The appellant's challenge to the array of jurors on the ground that not a single prospective juror was a daily wage earner or member of the working class was properly denied because it came too late, and also because it was not in

proper form and did not challenge the whole array but only the 56 persons drawn from it to serve as prospective jurors.

The appellant's other objections, insofar as not covered by what has already been said, have on consideration been found too insubstantial to call for discussion.

Judgment will be entered affirming the judgment of the District Court.

APPENDIX B

Sec. 302 (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: PROVIDED, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit

of the employees of such employer, and their families and dependents (or for such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): PROVIDED, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other place as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees

are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a *misdemeanor* and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 246

WADELMIRO ARROYO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of The United States

October Term, 1958

WADELMIRO ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-17) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1958. On July 24, 1958, the time to file a petition for a writ of certiorari was extended by Mr. Justice Frankfurter until August 4, 1958. The petition for a writ of certiorari was filed August 1, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence established that petitioner, a representative of employees, received money from employers for his own use, although ostensibly accepting such money for the purposes of a proper union welfare fund.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

* * * * *

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or

unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund * * *.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * *

STATEMENT

Petitioner was convicted in the United States District Court for Puerto Rico on an indictment charging a violation of § 302(b) and (d) of the Labor Management Relations Act, in that, as a representative of employees, he unlawfully received $15,000 from the employers not for a purpose permitted by the statute (R. 2, 3-5). He was sentenced to imprisonment for nine months and to pay a fine of $2000 (R. 2). On appeal, the conviction was affirmed.

The evidence showed that on February 21, 1953, two allied sugar corporations engaged in interstate commerce entered into a collective bargaining agreement with Local 1781, of which petitioner was president (R. 42-44). Article 6 of the agreement provided that the two employers would together pay $15,000 to an employee welfare fund to be administered by a committee appointed by mutual agreement of the parties (R. 26). At the time the agreement was

executed, the parties had informally agreed that petitioner would be the union representative on the committee (R. 51, 105-106).

Petitioner told the employers' representative that there was to be a meeting of the workers that same night and that he would like to show them the checks for the welfare fund (R. 46). The companies gave to petitioner two checks for $7500 each payable to Local 1781, with vouchers attached identifying the checks as the employers' contribution to the welfare fund. Petitioner endorsed the checks for the union as its president and had them endorsed also by the union's secretary (R. 27-31, 45-46, 114). Petitioner then opened an account in the name of the union's welfare fund in the National City Bank of Ponce and gave the bank a purported resolution from the union authorizing withdrawals from the account upon his own signature alone[1] (R. 67, 113, see also R. 115). Petitioner drew checks against that account for his own personal use (R. 76, 95). In March, 1953, the balance of $9,813.89 was withdrawn by a manager's check (R. 68) and deposited in the account of the union established March 1953 in the Banco de Ponce. Petitioner had sole authority to draw on this account (R. 79). Petitioner drew on this account for purposes not within the welfare fund (R. 82-83, 86-88, 91-92, 97-98).

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[1] The union had established in 1952 a welfare fund account in the Banco de Ponce (R. 51, 52). Checks on this fund were countersigned by a representative of the employers (R. 52).

ARGUMENT

The petition for a writ of certiorari is predicated on the assumption that the evidence showed only embezzlement of welfare funds and that the courts below decided that such embezzlement is an offense under Section 302 of the Labor Management Relations Act. But that was neither the theory of the prosecution nor the reasoning of the courts below. It was the government's theory, which the jury found proved and the courts below sustained, that at the moment petitioner received the checks his intent was to take the money, not for the welfare fund, but for himself. The judge charged the jury that "if you believe that from the time the defendant received said sum of money from the employers he had complete and sole control of said money, in violation of the collective bargaining agreement and the law, and utilized such money or any part of it for his personal benefit" then an offense had been committed under the statute (R. 237). In other words, the decision below represents merely a holding that, on the particular facts of this case, petitioner received the money, not for the kind of a welfare fund exempt under the statute, but for himself. He managed to get the money by pretending to take the checks for the welfare fund, but he took the money intending to use it for his own purposes. This is not a case where the money reached a proper welfare fund and was then misused, the situation which the proposed remedial legislation, referred to by petitioner (Pet. 6-7), is designed to reach. This is a case where petitioner from the start planned and carried through his plan to keep the money from ever reaching the proper welfare fund. The evidence of

the later use of the moneys by petitioner was offered, not as in itself constituting the wrongful act, but as casting light on the intent with which petitioner received the funds in the first instance.

There is no question but that a representative of employees who receives money from an employer for his own use (not for services or merchandise) commits a violation of Section 302. *United States* v. *Ryan*, 350 U.S. 299. Petitioner argues (Pet. 8) that he could not be guilty of unlawfully receiving the money for his own use (in the guise of receiving it for the welfare fund) because the evidence indicates that the employers were in good faith making the payment for the welfare fund. But as the court below pointed out (Pet. 16), the statute does not require mutuality of guilt for the conviction of either the employer or the representative of employees. It is possible to receive with guilty intent even though the giver acts in good faith. The fact that the employers intended in good faith to make the payment authorized by law does not necessarily mean that petitioner received the payment with the same intent. Rather, as the jury found, he received the money ostensibly for the welfare fund with intent to obtain control over it before it reached the welfare fund. He therefore received it from the employer for a purpose not authorized by the statute and was properly found guilty as charged.

The case does not present any question of general importance. The decision below is essentially one on the sufficiency of the evidence and presents no question requiring review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1958.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 246

WADELMIRO ARROYO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 267-72) is reported at 256 F.2d 549.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1958 (R. 273). On July 24, 1958, by order of Mr. Justice Frankfurter, the time within which to file a petition for a writ of certiorari was extended to August 4, 1958

(R. 275). The petition was filed August 1, 1958, and was granted October 13, 1958. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Sections 302(b) and (d) of the Taft-Hartley Act, so-called, make it a federal crime " . . . for any representative of any employees . . . to receive or accept . . . from the employer of such employees any money or other thing of value." Section 302(c) provides that (b) "shall not be applicable . . . (3) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees . . . " The principal questions presented by this petition are—

1. Whether petitioner could properly be convicted under §302 for receiving money from an employer on the strength of evidence of subsequent misappropriation of such money originally paid to and deposited in the name of a union welfare fund?

2. Whether there was not a fatal variance between an indictment and particulars stating that the money or other thing of value received by petitioner consisted of two specified checks delivered on a certain day and subsequent proof of and reliance on petitioner's withdrawal from a bank account of a variety of sums over a period of two months?

Statute Involved

Section 302 of the Labor Management Relations Act, 1947, 61 Stat. 157, also popularly known as the Taft-Hartley Act, 29 U.S.C. §186.

The full text of Section 302 is printed in the Appendix hereto (pp. 19-21, *infra*).

Statement of the Case

The petitioner was indicted in the United States District Court for the District of Puerto Rico on January 26, 1955, and charged with having received money from employers, "on or about February 24, 1953" in the form of "a sum of money in the amount of fifteen thousand dollars," in violation of §§302(b) and (d) of the Labor Management Relations Act (R. 3-4). On petitioner's motion for a bill of particulars, under Criminal Rule 7(f), the United States Attorney stated that the "$15,000 was received in two checks of $7,500.00 each" issued by the designated employers "on February 21, 1953" (R. 10). Petitioner was tried by jury, convicted and sentenced to imprisonment for nine months and to pay a fine of $2,000.00 (R. 2). The Court of Appeals affirmed the conviction (R. 273). Petitioner is presently at liberty under bond.

It was agreed that petitioner was for some years the President and principal bargaining agent of the "Union de Trabajadores de Factoria, Refineria y Ramas Anexas de le Industrial z Azucorera, Local 1781, Afiliada a la I. L. A." (hereinafter called the Union), that the Union was the bargaining agent for appropriate units of employees of two allied corporations—Central Mercedita, Inc., and Puerto Rican Sugar Refinery, Inc. (hereinafter called the Employers), and that the Employers were engaged in the production of sugar for movement in interstate commerce (R. 43, 205-07).

The government introduced evidence to the following effect:

On February 21, 1953, the Union and the Employers, after a bargaining session in which the petitioner was the chief

negotiator for the Union, entered into a collective bargaining agreement for the years 1953-1955 (R. 44, 46). Article (6) of that agreement (R. 26) provided for the establishment of a welfare fund, that the Employers should contribute $15,000 to the fund to provide medical care, hospitalization, etc. for the workers and their families and dependents, and that the fund was to be administered by a committee to be appointed by agreement between the Union and the Employers.

Two checks in the amount of $7,500.00 each and payable to the Union (R. 27, 29) bearing dates of February 21, 1953, were delivered by the Employers to the petitioner (R. 46, 165, 172). Each check so made out had a voucher attached showing that it represented the Employers' contribution to the welfare fund (R. 28, 31, 173).[1]

On February 24, 1953, the checks, as subsequently endorsed by the petitioner and one Luis Silvagnoli, secretary of the Union (R. 114, 27, 29) were deposited by the petitioner in the National City Bank in Ponce (R. 67) in an account in the name of the Union specifically designated as a Welfare Fund ("Plan de Beneficencia") (R. 77). A welfare fund for these employees had first been established in 1951 or 1952 (R. 52, 58) with a deposit in the Banco de Ponce in 1952 (R. 51, 60).[2]

On or about March 2, 1953, a Union resolution signed by several officers[3] was delivered to the National City Bank

---

[1] E.g. "covering: Welfare Fund for the year 1953 in accordance with contract signed on Feb. 21, 1953" (R. 28, 30, 31).

[2] As to the prior fund, the practice had been to have checks for benefits signed by the petitioner and countersigned by the employer representative (R. 52).

[3] There was a conflict of testimony between the government and defense witnesses as to whether one of the purported signers had in fact signed (R. 114-115, 166), but not as to the other signatories (R. 115, 117, 166).

which authorized petitioner to draw against the account over his signature, only (R. 113, 67, 68).

The government then put on, over objection, several witnesses (R. 76, 95), to withdrawals by petitioner, the first of which was almost three weeks after the deposit (i.e., on March 16, 1953 (R. 76)), for other than welfare fund purposes.

On March 26, 1953, petitioner closed out the account in the National City Bank and deposited the balance in another bank in the name of the Union (R. 68-69, 79). Additional witnesses to withdrawals by the petitioner from this fund, as late as mid-April, 1953 (R. 88) were presented by the government and testified over objection (R. 83, 87-88, 91, 97-98).

The District Court in overruling petitioner's several motions for judgment of acquittal (R. 159, 192-193, 261) and the Circuit Court in affirming, both rejected petitioner's contention that the only relevant evidence showed no receipt by him from the employers, but only a payment and deposit to and in the name of a prescribed welfare fund within the specific exemption of §302(c)(5); and that the evidence of subsequent unauthorized abstractions was improperly admitted, and could only result in petitioner's conviction for the crime of embezzlement which was not embraced within §302. Both Courts rationalized the introduction of such evidence (on a variety of theories, *Argument, post*) and held that, on the basis thereof, the petitioner could be found to have received money "from the employer" in violation of the statute.

Summary of Argument

The petitioner's conviction under §302 of the Taft-Hartley Act for receiving money from an employer cannot be sustained on the record in this case.

1. The legislative history shows that §§302(a) and (b) were directed against bribery and extortion, and that insofar as welfare funds were concerned, the objective of §302 was to prescribe standards for their establishment and joint administration. That these provisions did not embrace misappropriations and abstractions of union monies is particularly shown by the express legislative concern of the last (85th) Congress with such activities.

Since it is undisputed that there was no bribery or extortion here and that the money in question was paid by the employer and deposited by the Union in the name of a welfare fund (a payment exempted from §302),[4] no violation was made out.

Even if the evidence of petitioner's subsequent unauthorized withdrawals from the fund account was properly admitted, the novel "constructive receipt" theory of the government based thereon only resulted in Arroyo's conviction under §302, in all substance, for embezzlement, a crime not covered by that section. Such a distortion of the statute cannot be sustained under established principles of strict construction of criminal statutes.

2. In any event, the evidence of petitioner's subsequent misuse of the fund monies (concededly essential to conviction), constituting as it did highly prejudicial evidence of alleged commission of other (non-Federal) crimes, was not properly admitted. The various government theories on

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[4] The evidence on this point (produced by the government) fell directly within the language of the exemption (§302(c)(5)): "with respect to money or other thing of value *paid to a trust fund established by such representative* . . ." (Emphasis added.)

The Employers' efforts to participate in the administration of the fund at all relevant times (R. 51, 53, 110-111) confirms the existence of a fund within the §302(c)(5) exemption. In addition, the government conceded that, on the evidence, the Employers had bona fide made payments for the purposes of the exemption, and that no case could be made out against them (R. 132, 157).

this point are not tenable: the prosecution does not have the burden of negativing the exceptions to a statute. Since the crime was *malum prohibitum*, admission to show intent was unnecessary; and on the issue of control of the fund the evidence was merely cumulative.

3. Finally, even if petitioner could be convicted under §302 on this evidence, there was in this case a fatal variance between the indictment which, as modified by the particulars, alleged that the crime consisted in the receipt on February 24, 1953 of two specific checks, and the proof which confronted Arroyo with evidence of a number of transactions over several months.

ARGUMENT

I. The Legislative History Demonstrates That §302 Was Not Properly Applied to the Conduct Shown by the Government's Evidence.

This court, only three years ago, analyzed much of the materials on the legislative intent at the time of enactment of §302. In *United States* v. *Ryan*, 350 U.S. 299 (1956), the court said (pp. 304-06):

> "In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit. The United Mine Workers' demand that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. . . . *Nor* . . . (was) Congress . . . *aiming solely at the welfare fund problem* . . . As passed by the House of Representatives, the Hartley *Bill* forbade employer contributions to union welfare funds, and *made it an unfair labor practice to give*

> *favors to 'any person in a position of trust in a labor organization . . .'* H. R. 3020, 80th Cong., 1st Sess., §8(a)(2). The scope of this *bill was enlarged when it reached the Senate to include,* in the words of Senator Taft, *a 'case where the union representative is shaking down the employer . . .'* 93 Cong. Rec. 4746."

The Conference Committee Report (House Report No. 510, June 3, 1947, p. 67) indicates that §302 was aimed, as much as anything else, at exerting a degree of control and regulation over welfare funds and the compulsory check-off of union dues ("the two most important exceptions"—*ibid.*).

The foregoing sources show that §302 was aimed overtly at bribery (ordinarily, but not invariably, of union representatives) and extortion (ordinarily, from employers) with important supplemental objectives of preventing the accumulation of massive and uncontrolled financial power in unions from welfare funds (and dues check-offs).[5]

Both the Court of Appeals (R. 270) and the District Court (R. 49, 89, 236 (charge to jury)) ruled the conduct of petitioner, of which there was evidence, in withdrawing monies from an established fund for personal use, was within the sweep of §302, by ascribing a far broader purpose to the section than the legislative materials sustain. To do so, both courts relied solely on a misconstruction of an observation of this Court in *Ryan, supra.* In saying (*ibid.*, p. 304) that Congress was disturbed by union demands that employers contribute to funds which were "in the sole control of the union or its officers and could be

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[5] The contemporaneous analysis, by a well-known writer on labor law, of the objective of §302 was that it sought to limit the power derived by unions from such funds by the imposition of various standards such as joint administration with employers. Cox, *The Labor Management Relations Act*, 61 Harv. L. Rev. 274, 289-91 (1947-48).

used as the individual officers saw fit," the Court in no way intended to suggest that Congress was concerned with or aiming at the problem of misappropriations and abstractions from such funds for personal benefit, as the entire statement of *Ryan* (quoted above) reveals. That such an interpretation of that one sentence was improper is shown by the immediately-following example (of the United Mine Workers), given by Mr. Justice Clark. It was not suggested then that Mine Workers officials were pilfering their well-known fund; rather, the Congressional concern was over the power to use these great amounts for broad (but non-welfare) union purposes (i.e., for strike funds or political campaigns).[6]

That the wholly distinct problem of embezzlement and misuse of such funds once created in accordance with the standards prescribed in §302, was not intended to be reached by that section is convincingly shown by the recent expressed Congressional concern over those very activities. Thus, the last (85th) Congress enacted the Welfare and Pension Plans Disclosure Act, 85th Cong., P.L. 836, 72 Stat. 997, designed, as the committee report shows (Senate Report No. 1440), to attempt to curb maladministration of such funds by disclosure and publicity. In addition, that Congress considered (and the Senate passed) legislation (the Kennedy-Ives bill) expressly making it a federal crime to abstract monies from such accounts (S. 3974; cf. Sen. Rep. No. 1684, pp. 1, 3, 16).[7]

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[6] See *Cox, op. cit., supra.*

[7] Sec. 109 (a) of S. 3974 (passed by the Senate June 17, 1958) read: "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or the use of another any of the moneys, funds, securities, property, or other assets of an organization which is exempt from taxation under Section 501 (a) of the Internal Revenue Code of 1954 of which he is an officer or by whom he is employed directly or indirectly shall be fined

The fact that Congress has subsequently found it necessary to legislate expressly against conduct of the sort which the government principally relies on for conviction here is the strongest indication that §302 does not and was not intended by Congress to cover the facts of this case. *Bailey, Collector* v. *Clark, et al.*, 21 Wall. (88 U.S.) 284, 288 (1874); 2 Sutherland, *Statutory Construction* (3d ed.) §5110.

The government contends that the payments to and in the name of a welfare fund notwithstanding, a receipt by petitioner from employers under §302(b) is made out on the evidence, principally that of the subsequent withdrawals. Accepting for purposes of this argument under Point I that such evidence was properly admitted (as it was not, Points II, III, *post*), it is submitted that such a receipt was *not* shown by this evidence. While, as noted (Point II, 1., *infra*), the government's theories of the case varied considerably, it is assumed that they came down to the proposition that, although the employer paid and the union deposited the $15,000 to and in the name of an *exempted* welfare account, Arroyo's intent and/or power over the monies (as shown by the aforesaid evidence) was such that, in effect, he received the money personally the instant it went into the bank. *That* is not a case within §302(b).

In the first place, both courts relied, as noted above, for their ruling that such evidence made out a case within the scope of the statute, on a wholly erroneous construction of this Court's statement in *Ryan*. And they ignored the prior

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not more than $10,000, or imprisoned for not more than five years, or both."

Sen. Rep. No. 1684 (to S. 3974) expressly states the Congressional understanding that §302 (a) and (b) were limited to extortion or bribery (p. 16): "Section 608 of the committee bill strengthens Section 302 . . . by making it applicable to all forms of extortion and bribery . . . Although these provisions of existing law would punish most forms of bribery or extortion . . ."

and subsequent legislative history showing that subsections (a) and (b) of §302 were directed only at bribery and extortion and, insofar as welfare funds were concerned, not at cases of personal profiteering from or maladministration thereof.[8]

Such a doctrine of "constructive receipt," concededly being novel (R. 20, 36, 39-40), represents an unduly broad construction of a criminal statute.

> *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96 (1820) (Marshall, *C.J.*);
> *Viereck* v. *United States*, 318 U.S. 236, 245 (1943).

> "Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law."[9]

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[8] Petitioner's view of the intended scope of §302 (a), (b), insofar as those sections relate to this case, may be expressed another way: the only acts (of payment and receipt) they render criminal are those possessing the element of mutuality, i.e., no one is bribed or the victim of extortion unknowingly, even though he may be relatively guiltless. Since it is established on the record that the employers' payments were proper, bona fide payments for a welfare fund and not a subterfuge (R. 132, 157; f.n. 4, p. 6), petitioner's unilateral conduct cannot bring the case within the Act.

[9] §302 has been given contrasting and, we submit, properly constrained construction by two other circuits (on different issues). *United Marine Division* v. *Essex Transportation Co.*, 216 F.2d 410, 413 (3rd Cir. 1954) (employer's oral promise to pay trustees not barred by §302 (a), (b) as not made to a "representative"); *Ventimiglia* v. *United States*, 242 F.2d 620, 623-24 (4th Cir. 1957) (payment to union organizer for refraining from organizing defendant's employees not a payment to a representative of its employees). The statement of this court in *United States* v. *Ryan*, 350 U.S. 299, 304 that "representative" should not be given a narrow construction, certainly a commonsensical result, is hardly to be read as a call for the sweeping reading to the whole statute made below.

That this constructive receipt theory constitutes an unwarrantably broad construction of the statute is shown by several considerations apart from its novelty. Even if the admission of the evidence on a Sec. 302(b) case be rationalized, it is obvious that, in all substance, the jury was presented, and based its verdict on, what was essentially a case of embezzlement. This is strongly indicated by the fact that, although the indictment (as particularized) alleged only receipt of two checks for $7,500 each on February 24, 1953, seventy-five percent of the government's case (eight witnesses (R. 66-123)) was directed to the issue of subsequent withdrawals and expenditures, while only one witness (R. 42-66) was called to testify concerning the payment and receipt. Most of the former testimony was in essence cumulative.[10]

Again, this theory proves too much. If a proscribed receipt from an employer, on February 24, can be established primarily on the strength of misuse of welfare fund monies over a period of two months later, then there is no logical reason why such a crime cannot be retroactively established at any date. Since employer payments to such funds are made periodically, any abstraction from a fund within six months (or a year) after such a payment, could, on the theory of this case, make out a "receipt" from the employer; all cases of misappropriations and embezzlements would be brought within §302(b) and the extended legislation and concern of the 85th Congress with those questions would have been completely unnecessary.

An additional indication that the statute was improperly construed arises from the fact that the crime is *malum prohibitum*. *United States* v. *Ryan*, 350 U.S. 299, 305 (1956). It is a characteristic of such offenses that they consist of

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[10] All of this evidence of withdrawals amounted to only $1,500-$2,000 of the $15,000 which petitioner was charged with receiving (R. 222).

such clear, definite, unmistakable acts, carrying with them in common experience so great a likelihood of undesirable social consequences, that proof of intent may be dispensed with. *United States* v. *Balint*, 258 U.S. 250, 252-53 (1922); *Commonwealth* v. *Mixer*, 207 Mass. 141; *Commonwealth* v. *Smith*, 166 Mass. 370, 375 (Holmes, *J.*). Here, by contrast, the conduct of February 24, 1953 condemned was of such an amorphous imprecise character that its criminality is established only in the context of events in the ensuing two months.

In sum, the legislative history shows that insofar as the statute deals with the administration of welfare funds it is with aspects unrelated to petitioner's conduct here. Novel and ingenious constructions of a criminal statute, sweeping wide categories of offenses within the scope of the section (cf. *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957)) should not be countenanced especially where such result interferes with deliberate, extensive, and as yet uncompleted Congressional consideration of the very problems.[11]

II. The Evidence of Subsequent Misuse of the Fund Was Not Properly Admitted Under Section 302.

Without that evidence, the government had no case, as both courts below recognized (R. 145, 148-9; R. 271). The various theories for its admission which the government advanced were untenable.

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[11] Thus, not only has the chairman of committee which produced S. 3974 indicated his intention to re-introduce the bill in the next Congress (Report of speech by Senator McClellan, Boston Daily Globe, November 12, 1958, p. 5, cols. 7-8), but the Welfare and Pension Funds Disclosure Act, 85th Cong. P.L. 836, 72 Stat. 997 expressly provides (Sec. 10(b)) that nothing therein shall exempt or relieve liability under "any present *or future law of the United States* affecting the operation . . . of (such) plans" and also contemplates Congressional re-examination of the whole question in four years (Sen. Rep. No. 1440).

1. At least three separate and distinct theories to justify the admission of such evidence have been suggested at various points: (a) that the government had to negative the exceptions to the statute (R. 9, 41, 49, 73); (b) that the evidence showed petitioner's control over the fund was such that he, in effect, received the $15,000 at the instant of deposit in the bank (R. 71, 94, 148, 199); this was the view of the Court of Appeals (R. 271); (c) a theory, adverted to in the trial court (R. 191) but not in the court below, but again advanced in this court (Brief in Opposition to Petition, p. 6), that the evidence showed petitioner's intent to be such at the time of delivery of the checks that he then received the money (R. 188, 192). In addition, the government advanced another proposition which, ignoring the indictment and particulars, did not rely on receipt of the checks at all but, treating those as "mere orders for payment," hypothecated an indirect receipt at the time of the actual subsequent withdrawals (R. 185, 193, 199).

It is submitted that the inability of the government to formulate a coherent, consistent theory of its case is additional persuasive indication of a stretching of the statute beyond endurance.

In any event, the theories were untenable. It must be kept in mind that the evidence of this type, constituting as it did highly prejudicial evidence of other alleged crimes, is not admitted unless its essentiality to prove an element of the crime charged outweighs its tendency for prejudice and other probative difficulties.

> *United States* v. *Krulewitch*, 145 F.2d 76, 80 (2d Cir., 1944). (L. Hand, *J.*)

2. The government does not have the burden of negativing the exceptions to a criminal statute either with respect

to the allegations of the indictment or the proof at the trial.[12]

Edwards v. *United States*, 312 U.S. 473, 483 (1941);
United States v. *Krepper*, 159 F.2d 958, 968 (3rd Cir., 1946), cert. den. 330 U.S. 824 (1947);
United States v. *Holmes*, 187 F.2d 222, 225 (7th Cir., 1951), cert. den. 341 U.S. 948 (1951).

3. Since the crime was *malum prohibitum* only (*Ryan*, *supra* at p. 305), the government did not have to establish intent (R. 16), and a highly contrived theory by which an element which is traditionally unnecessary becomes an essential ingredient of the crime cannot justify the resultant prejudice.

4. Admission to show "control" of the fund is not warranted since the evidence was not essential but merely cumulative on this point. There was in the case ample showing of control of the fund in the testimony as to the union resolution permitting withdrawals on Arroyo's sole signature and his express request of the union members that he be permitted to withdraw without the necessity for countersignature.

That the foregoing theories of admissibility should not be endorsed receives additional support from the principles of construction of criminal statutes already set out herein (Point I, *supra*).[13]

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[12] Indeed a ruling to that very effect, at least as to the indictment, had been made by this same District Court of Puerto Rico in a §302 case, just before the instant indictment was returned. *United States* v. *Waterman Dock Co.*, 131 F.Supp. 956 (D.C.P.R. 1955).

[13] It cannot be argued that the statutory scheme shows an intention to have the validity of payments to a welfare fund depend on subsequent events merely because the statute sets out certain

III. In Any Event, There Was a Fatal Variance Between an Indictment (as Particularized) for Receipt of Two Checks on a Day Certain and Proof of and Reliance on Receipt of a Variety of Sums Over Two Months.

This question is fairly comprised within the question presented in the petition for certiorari;[14] in any event, it constitutes plain error on the record.

As the statement recites, the prosecution, on petitioner's motion for particulars to the allegation in the indictment that defendant received "fifteen thousand dollars" on "February 24, 1953," stated that it consisted of two checks of $7,500 dated February 21, 1953 (R. 10). At the trial, as repeatedly developed above, the government presented and relied primarily on, the numerous witnesses to events after February 24 and through mid-April 1953.

It is submitted that such procedure constituted a variance affecting the substantial rights of petitioner within the meaning of Fed. Crim. Rule 52. *Kotteakos* v. *United States*, 328 U.S. 750, 766-67 (1946).[15] As was said in *Kotteakos* (p. 767), with respect to a variance between a charge of a single broad conspiracy and proof of a number of individual conspiracies, the burden on a defendant who pre-

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requirements (annual audit, filing reports, providing for arbitration in case of deadlock), which cannot be complied with until time has passed. A proper reading must be that, as far as criminal sanctions are concerned, the legality of a payment to a fund under subsections (b), (c), and (d) depends on the circumstances of and surrounding the payment, whereas the sanction for subsequent violation of the other regulatory provisions is not retroactive criminality, but equitable enforcement as expressly provided for in subsection (e).

[14] Which, broadly read, challenged, *inter alia*, the validity of petitioner's conviction under §302 (for receiving) on the strength of the aforesaid evidence.

[15] *Kotteakos* dealt with former section 269 of the Judicial Code (28 U.S.C. §391) which was repealed in the 1946 revision, in view of its duplication by Rule 52.

pares to meet a charge of criminality with respect to a single transaction and is confronted with a number of transactions is considerable and, when he has been misled on the point, prejudicial.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a judgment of acquittal or, at the least, grant a new trial.

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APPENDIX

Sec. 302(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: PROVIDED, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or for such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): PROVIDED, That (A) such payments are held in trust for the purpose of

paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or, in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other place as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a *misdemeanor* and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the

provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

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No. 246

In the Supreme Court of the United States

OCTOBER TERM, 1958

WADELMIRO ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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House Rep. No. 510, 80th Cong., 1st Sess., pp. 24, 25, 67	23
S. 1126, 80th Cong., 1st Sess.	22, 23
S. Rep. No. 105 (80th Cong., 1st Sess., pp. 12, 31, 34, 52–53, 56)	23
Underhill, *Criminal Evidence* (5th ed.), § 788, p. 1800	35

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 246

WADELMIRO ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 267–272) is reported at 256 F. 2d 549.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1958 (R. 273). On July 24, 1958, the time to file a petition for a writ of certiorari was extended by Mr. Justice Frankfurter until August 4, 1958 (R. 275). The petition for a writ of certiorari was filed August 1, 1958, and was granted on October 13, 1958 (R. 277). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 302 of the Labor Management Relations Act of 1947 makes it unlawful for any employees' representative "to receive or accept, * * * from the employer of such employees any money * * *." This prohibition, however, is not applicable "(5) with respect to money * * * paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer * * *." The following questions are presented:

1. Whether an employees' representative violates this section by receiving from employers money which, although given for a union welfare fund, was actually accepted and used by the representative for personal purposes.

2. Whether the evidence supports the jury's verdict that petitioner violated this section by accepting from employers, for personal purposes, money which he deposited in a union welfare fund over which he had complete control.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or ac-

cept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their

families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such writ-

ten agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both * * *.

* * * * *

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for Puerto Rico under an indictment charging that, in violation of Section 302 (b) and (d) of the Labor Management Relations Act of 1947, he had unlawfully received $15,000 from employers (R. 2, 3–5). He was sentenced to imprisonment for nine months and to pay a fine of $2,000 (R. 2). The Court of Appeals for the First Circuit unanimously affirmed the conviction.

1. The evidence for the government may be summarized as follows:

On February 21, 1953, two allied sugar corporations in Puerto Rico engaged in interstate commerce, Central Mercedita Inc. and Puerto Rican American Refinery, Inc., entered into a collective bargaining agreement with a union (Local 1781, Union de Trabajadores de Factoria, Refineria y Ramas Anexas), of

which petitioner was president (R. 42–44). Article 6 of the agreement provided that the two employers together would pay $15,000 to an employee welfare fund to be administered by a committee appointed by mutual agreement between the employers and the union (R. 26). The fund was to be used "to furnish and provide the workers of the Employer * * * with means of hospitalization * * * and other medical aid in case of non-occupational illnesses or accidents" (*ibid.*). The committee was to furnish the employers with a monthly statement of disbursements (*ibid.*).

In a 1952 labor contract between the same parties, a similar welfare fund had been established in the Banco de Ponce and distributed by a committee composed of petitioner for the union and a Dr. Clavell for the employers (R. 52). Checks drawn against the fund were signed by both representatives (*ibid.*). At the time the 1953 agreement was executed, the parties informally agreed that petitioner would continue to be the union representative on the committee, and that the employers' representative would be Mr. Pedro G. Goyco (R. 42, 51, 105–106).

The money for the 1952 welfare fund had been deposited by a representative of the employers (R. 60). However, after the 1953 contract was signed, petitioner told the employers' representative, Mr. Goyco, that there was to be a meeting of the workers that evening, and that he wanted to show them the checks for the welfare fund (R. 46). Each company gave petitioner a check for $7500, payable to the union (R. 27, 29, 172; see R. 147). Attached vouchers identified the checks as the employers' contributions to the welfare

fund (R. 28, 30–31). Petitioner endorsed the checks for the union as its president and also had them endorsed by its secretary, Mr. Luis Silvagnoli (R. 27, 29, 45, 114). Instead of depositing the checks in the then-existing welfare fund bank account, however, petitioner, without consulting the employer representative, on February 24, 1953, opened an account in the name of the union's welfare fund in another bank, the National City Bank of Ponce, Puerto Rico (R. 56, 67, 77). A few days later, he gave the bank a purported resolution from the unions' board of directors authorizing withdrawals from the account upon his signature alone (R. 56, 67–68, 73, 77, 113).[1]

As soon as the employers learned that the checks had been deposited in a new bank account and not in the previous welfare account, they attempted to secure performance of the agreement for joint administration of the fund (R. 51–52). Petitioner, however, consistently refused—over a period of several months—to comply with the agreement or to account for the money (R. 51–53, 110).

[1] The meeting at which the resolution allegedly was passed never took place (R. 115). Besides petitioner's signature, the only signature appearing on the resolution when it was introduced in evidence purported to be that of Luis Silvagnoli, the union secretary, but Silvagnoli's "signature" was shown to be a forgery (R. 114–115). Mr. Juan Rivera, a member of the union's board of directors, appeared as a witness for the defense and testified that he and others had signed the resolution originally (R. 163, 165–166), thus suggesting that a portion of the resolution had been cut off (see R. 116–117). However, he conceded that the name "Luis Silvagnoli" appearing on the exhibit did not resemble the secretary's signature (R. 167). There was no testimony concerning the circumstances under which the resolution was mutilated.

On March 16, 1953, approximately three weeks after the opening of the new account, petitioner began to draw personal checks on it. He transferred $1,300 to his personal checking account (R. 74, 76), and drew upon the welfare fund account to make the down payment on a new automobile (R. 76, 95–96). Ten days later (March 26, 1953), following the employers' complaint that petitioner was not complying with the agreement for joint administration of the fund, petitioner withdrew the balance of the fund ($9,813.89) by a manager's check (R. 68–69). The same day, he deposited the balance in a new account which he opened in the union's name in the Banco de Ponce (R. 79–80). Petitioner had sole authority to draw on this fund, and the name of the account made no reference to welfare fund purposes (R. 79–81).[2] Petitioner continued to use this account for personal purposes, and also used it for some non-welfare union purposes. He paid off a personal debt for household furnishings (R. 83, 86–88) and purchased office furniture and equipment (R. 83, 91, 97–98), at a time when the welfare funds were the only moneys on deposit in the account (R. 98).

2. At the conclusion of the government's case, petitioner moved for a judgment of acquittal on the ground that Section 302 does not cover embezzlement

[2] Checks drawn on union funds were supposed to be countersigned by Mr. Silvagnoli, the secretary (R. 123), but petitioner expelled Silvagnoli from the union on April 22, 1953, even though Silvagnoli had been elected by the rank and file (R. 120–121). Four days later, petitioner called a meeting of the union members and demanded the right to draw checks against union funds solely on his own signature (R. 123).

of union welfare funds, and that was all that the evidence showed (R. 125–131). After lengthy argument (R. 125–159), during which the government pointed out (R. 141–142) that the theory of the case was not embezzlement, but that petitioner intended to appropriate the checks to his own use from the outset, the trial court denied the motion (R. 159).[3] The court, after summarizing the government's evidence (R. 146–148), concluded (R. 148–149) that

> * * * this evidence is sufficient to permit the jury to find that the defendant actually received from the employer the moneys he drew from this account for his own personal purposes, and that these funds were not received by the defendant, nor did he intend to receive them in pursuance of the creation of the welfare fund * * *.

The court expressed a similar view when, in again denying a motion for acquittal at the conclusion of the case (R. 177, 192), it stated (R. 191, 190):

> [R]ight from the beginning before the conversation the defendant had the intention of getting full control of that money * * * under the evidence the union never had control of the fund.

Along these same lines, the court instructed the jury as follows (R. 235–237):

> As I see the statute, the purpose for which the money or anything of value is delivered and received must be a mutual purpose. *If the*

[3] The court stated (R. 137) that "[o]nce the fund was lawfully established and deposited in the care of the union," subsequent embezzlement therefrom would not violate Section 302.

employer, in delivering money delivers it for the exclusive purpose of creating a fund, and that it be complying with the requirements of this section, *the representative receiving that money must have the same objective in mind. Now, if his objective is different, and if he gets hold of the money and does not comply with the provisions of this section as to the fund,* the welfare fund, *as required by the employer in the entry on the vouchers, then he cannot claim that what the employer said must guide you.*

You must be guided simply by what happened. What was the actual situation? *What were the circumstances under which this money came into the possession of the defendant?* What the employer might have intended does not count, unless that purpose is accomplished. * * *

* * * * *

I further charge you that if you believe from all the evidence beyond a reasonable doubt that the defendant Wadelmiro Arroyo obtained or received from the employers Central Mercedita, Inc., and Puerto Rican American Refinery, Inc., the sum of $15,000, and that by law, which is the sole and exclusive benefit of the employees of the employer and their families and dependents for the purposes of paying for medical and hospital care, pensions, on retirement or death of employees, but rather if you believe that from the time the defendant received said sum of money from the employers he had complete and sole control of said money, in violation of the collective bargaining agreement and the law, and utilized such money or

any part of it for his personal benefit, then I charge you that the defendant has violated the above mentioned section of the law * * *. [Emphasis added.]

3. In unanimously upholding petitioner's conviction, the Court of Appeals stated (R. 271) that the question is whether petitioner "'received' the checks on behalf of the Union for its welfare fund to be administered according to the terms of the collective bargaining agreement, or whether he accepted the checks for a bogus welfare fund, i.e., one over which he in fact had complete and sole control in violation of the collective bargaining agreement, for in that event he did not 'receive' them under any of the circumstances permitted by subsection (c) of § 302 of the statute"; and it ruled (*ibid.*) that the conviction was supported by the evidence of petitioner's "conduct in obtaining sole personal control over the fund and then in withdrawing from it for his own personal expenses soon after he deposited the checks in the Ponce branch of the National City Bank."

SUMMARY OF ARGUMENT

Section 302 of the Labor Management Relations Act of 1947 prohibits a representative of employees from receiving or accepting from their employer "any money" or other thing of value; however, this broad prohibition is inapplicable, *inter alia*, "with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families or dependents." Petitioner was tried and convicted of violating this section on the

theory that, although he accepted $15,000 from the employers purportedly for a union welfare fund, in fact he accepted the money for his personal use.

I

A. Contrary to petitioner's contention, the "broad prohibition" (*United States* v. *Ryan*, 350 U.S. 299, 305) in Section 302 is not limited to money or things of value which a representative obtains through bribery or extortion. Neither the language of the provisions, nor their legislative history, indicates that the section is thus restricted.

B. An employees' representative violates Section 302 by accepting money from an employer with the intent of using it personally, even though the money ostensibly is accepted and deposited in a union welfare fund. The acceptance of money by a representative in such circumstances does not come within the exception of Section 302 because there is no bona fide "trust * * * for the * * * benefit of employees."

1. The legislative history of Section 302 shows that Congress intended to prohibit a representative from receiving from employers anything of value, ostensibly for a proper welfare fund but actually with the intent of using it for a purpose not covered by the five specific exceptions in Section 302. In proposing Section 302, the sponsoring Senator stated (93 Cong. Rec. 4678) that "[u]nless we make sure that such [welfare] funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, there is

very grave danger that the funds will be used for the personal gain of union leaders * * *."

2. The fact, upon which petitioner relies, that the $15,000 was paid by the employers with the intent of creating a welfare fund, and was deposited by petitioner in the bank in the name of such fund, does not exculpate him. Such reliance on the form, rather than the substance, of the transaction could well lead to evasion of the statute. The Act clearly prohibits a representative from receiving from an employer a direct payment which is not covered by one of the exceptions. However, the same proscribed result could be achieved indirectly if the representative ostensibly could treat the money as a welfare fund, and yet use it for personal purposes. A sham would prevail.

The prohibitions of Section 302 are not limited to those acts "possessing the element of mutuality", *i.e.*, it is not necessary for a violation that both the representative and the employer must be guilty. The Act contains separate prohibitions against improper payments by employers, and improper receipts by representatives, and violation of one provision is not a prerequisite to violation of the others. Congress, in enacting Section 302, thus applied a settled principle in criminal law that the grantor of property may have a different intent than the grantee, and that one may be guilty even though the other is not.

3. Contrary to petitioner's contention, the case was not tried or presented to the jury, and his conviction does not rest, upon any theory of embezzlement.

The theory of the prosecution was not that petitioner misappropriated property which lawfully came into his possession, but that his initial possession of the property was tainted because from the outset he intended to convert it. Petitioner, therefore, was tried and convicted not for embezzlement but for conduct amounting to larceny by trick. The distinction between these two crimes is well settled. Where property is entrusted for a special purpose but the recipient takes it with intent to use it for his own purposes, he is guilty of larceny and not embezzlement; and where he obtains the property by fraud or trick, the offense is the form of larceny known as larceny by trick.

II

The jury was charged that, to convict, it had to find that petitioner had a different purpose in accepting the $15,000 than the employer's purpose in turning it over to him, that of creating a proper welfare fund. The evidence supports the jury's verdict that petitioner received the money with the intent, from the beginning, of using it for his personal purposes and not for a proper welfare fund.

Petitioner's official position as president of the union enabled him to obtain the checks by purporting to accept them for the employees' welfare fund. The welfare fund was established as one of the results of a collective bargaining agreement and it was identical in amount and purpose to the fund created by a prior contract between the same parties. The prior fund had been disbursed jointly by petitioner and a member of management, and it was expressly agreed that the

new fund would also be subject to joint control. Since petitioner was to continue as the union member in the administration of the fund, it is not strange that the employers delivered the checks to petitioner when he said that he wanted to show them to the union members.

The jury was warranted in concluding that petitioner never accepted the money for the purpose for which it was given. Instead of depositing the checks in the former welfare fund account, petitioner established a new account in a different bank—an account over which the employer representative had no control. He used a spurious union resolution to authorize his drawing on the account on his own signature alone. He spent large sums from the fund on personal enrichment. After transferring the balance of the fund to a general union account, he expelled from the union the secretary whose counter-signature was normally necessary on union checks. He continued to divert the fund to personal uses. He eventually commingled the residue of the welfare money with general union funds.

ARGUMENT

Section 302 of the Labor Management Relations Act of 1947 prohibits a representative of employees from receiving or accepting from their employer "any money" or other thing of value. However, this broad prohibition is inapplicable, *inter alia*, "(5) with respect to money or other thing of value paid to a trust fund established [for certain specified welfare purposes] by such representative, for the sole and exclusive benefit of the employees of such employer, and

their families and dependents." *Supra*, p. 3. Petitioner was tried and convicted of violating this section on the theory that, although he accepted $15,000 from the employers purportedly for a union welfare fund, in fact he accepted the money for his personal use.

Petitioner contends that such conduct does not violate Section 302. He argues (Br. 11) that the section is directed only at "bribery and extortion," and does not cover "personal profiteering from or maladministration" of union funds; and that since the $15,000 "was paid by the employer and deposited by the Union in the name of a welfare fund (a payment exempted from § 302), no violation was made out" (Br. 6, footnote omitted), without regard to whether the deposit in the name of the union was but a mere sham, designed to enable the representative to use the money for personal and other non-welfare fund purposes.

We shall show, however, that Section 302 is not limited to prohibiting acceptance of money obtained by an employees' representative through bribery and extortion; that it also covers receipt of money which, although intended by the employer for, and ostensibly deposited by the representative in, a union welfare fund, is in fact accepted by the representative with the intent of using it for personal rather than union welfare purposes; and that the evidence justified the jury in concluding that from the beginning petitioner accepted the $15,000 with the intent of using it personally.

I. SECTION 302 PROHIBITS A REPRESENTATIVE OF EMPLOYEES FROM ACCEPTING FROM THEIR EMPLOYER, WITH INTENT TO USE IT PERSONALLY, MONEY WHICH HE PURPORTEDLY ACCEPTS AND DEPOSITS AS A UNION WELFARE FUND

A. *The Prohibitions in Section 302 Against a Representative Accepting Money From an Employer Are Not Limited to Money Obtained Through Bribery and Extortion*

Section 302 contains "a broad prohibition" (*United States* v. *Ryan*, 350 U.S. 299, 305) against "any representative" of employees receiving or accepting from their employer "any money or other thing of value," unless it comes within "five specific exceptions" (*ibid.*). Neither the prohibition, nor any of the exceptions, limits the ban to money or things of value which are obtained by bribery or extortion.

Nor does the legislative history of this provision establish that Congress intended thus to limit the reach of Section 302. While that history shows that Congress was concerned with bribery and extortion involving employee representatives, "Congress [also] was disturbed by the demands of certain unions that the employers contribute to 'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit." *United States* v. *Ryan, supra*, at 304. To deal with this situation, Section 302 "outlaws all payments, with stated exceptions, between employer and representative." The legislative history, discussed *infra*, pp. 18–24, clearly does not sustain petitioner's contention that the only "payments * * * between employer and

representative" (*Ryan* case, *supra*, p. 305) which Congress prohibited were those which grew out of bribery or extortion.

B. *An Employees' Representative Violates Section 302 by Accepting Money From an Employer With the Intent of Using it Personally, Even Though the Money Ostensibly is Accepted and Deposited in a Union Welfare Fund*

The basic theory on which this case was tried and submitted to the jury, and upon which petitioner was convicted, was that, although he purportedly accepted the $15,000 for a union welfare fund, he in fact accepted the money with the intent of using it for his own purposes. In other words, petitioner's receipt of the $15,000 did not come within the exception of Section 302(c)(5) because there was in this instance no bona fide "trust * * * for the * * * benefit of the employees * * *" (*supra*, p. 3); it therefore fell within the ban of the general prohibition in Section 302(b). While the employers may have intended that the money was to go into such a fund, petitioner had a different purpose in accepting it, namely, to use it personally. We submit that petitioner's acceptance of the money in such circumstances is prohibited by Section 302.

1. The legislative history of Section 302, from its original language in the Case Bill (H.R. 4908, 79th Cong., 2d Sess.) to its final version in the Taft-Hartley Act, affirmatively shows a general Congressional intent to protect the integrity of the collective bargaining process by prohibiting financial payments by employers to unions or union representatives, and to regulate union welfare funds so as to prevent their

diversion from health, hospital, medical, and retirement purposes. It shows that Congress sought to prohibit any representative from receiving from employers anything of value, ostensibly for a proper welfare fund but actually with the intent to use it either personally or for a purpose not covered by one of the five specific exceptions in Section 302(c), and without regard to the purpose with which the employer paid the money.

Section 302 had its origin in an amendment to the Case Bill which Senator Byrd proposed from the floor in the 79th Congress. It was the purpose of the Case Bill, as recited in its preamble, "to encourage settlement of disputes between labor and management by collective bargaining and by conciliation, mediation and voluntary arbitration, thereby minimizing industrial strife, strikes and lock-outs."[4] When the Case Bill came before the Senate, Senator Byrd moved to insert an amendment forbidding any payment by an employer, or any receipt by a representative, unless the payment was for services as an employee, or was for union dues withheld by the employer under a "check-off" agreement. 92 Cong. Rec. 4809. Senator Byrd explained briefly that the purpose of his amendment was to insure that funds would not be paid by an employer or received by a representative if the representative was to have exclusive control over the fund. 92 Cong. Rec. 4892–4895. He had in mind that, if payments for other than specified proper purposes were not outlawed, and

[4] H.R. 4908, 79th Cong., 2d Sess., as passed by Congress on May 31, 1946 (92 Cong. Rec. 5957, 6071).

some sort of control provided for the permitted funds, the payment might be made to bribe the representative (92 Cong. Rec. 4893) or the fund might be used by the representative to finance political activity rather than welfare benefits (92 Cong. Rec. 4894).

Despite Senator Byrd's protest that his amendment would not prevent an employer from establishing a welfare fund through collective bargaining, or from making contributions to ordinary employee functions, such as a baseball team, some Senators objected that the amendment as drawn was so broad as to forbid innocuous employer contributions. 92 Cong. Rec. 4896. To meet this objection, Senator Knowland offered modified language forbidding payments which would be under exclusive union control. He stated (92 Cong. Rec. 4899):

> * * * [T]he proposed language would not prevent the establishment of a health or welfare fund where, under trusteeship or otherwise, it would be for the benefit of the miners, but the fund could not be used for political or other purposes.

Here Senator Knowland envisioned the case where funds are given for a proper purpose but accepted for an improper one—accepted with the secret intent to use the money for political purposes. Senator Byrd recognized the desirability of specifically permitting welfare funds while forbidding their diversion, for he subsequently offered a modified version of his amendment containing a requirement of dual control over welfare funds by employers and employees. 92 Cong. Rec. 5040.

The Byrd amendment remained the pending business before the Senate for the next few days, during which its merits and disadvantages were extensively discussed. 92 Cong. Rec. 5041–5044, 5056–5065, 5073–5100, 5248–5276. Then, Senators Ball and Taft offered a modification of the language of the amendment which was accepted by Senator Byrd and which now appears, with minor changes, as subsection (c)(5) of Section 302, dealing with welfare funds. 92 Cong. Rec. 5277. Later, in discussing the modified Byrd amendment on the floor of the Senate, Senator Ball explained its intent. He said (92 Cong. Rec. 5345–5346):

> Mr. President, in the past Mr. Lewis has seen fit to spend the funds of the United Mine Workers for various educational purposes, including the organizational activities of the CIO and of District 50, which is out organizing all kinds of employees from railroad employees to farmers and dairy workers and everything else. Maybe that is what he means by "educational aid to miners and their families" [an allusion to one of Mr. Lewis's stated purposes for raising a welfare fund].
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> * * * * *
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> * * * [T]he Byrd amendment is the least we can do in the United States Senate to protect the individual employees from being the victims of union bosses who will demand these funds without any strings attached to them, to be paid over to the unions, and will then use them to perpetrate their power over the employees. If these funds are to be established, they should at least be protected in their estab-

lishment and in their administration *so that they will actually be spent for the purposes for which they are supposedly established.* [Emphasis added.] [5]

The Byrd amendment was adopted by the Senate (92 Cong. Rec. 5521–5522) and the Case Bill passed. 92 Cong. Rec. 5739. The House accepted the Senate amendments (92 Cong. Rec. 5946) but the President vetoed the bill (92 Cong. Rec. 6674–6678) and it failed to pass over his veto. 92 Cong. Rec. 6678.

The 80th Congress also undertook to revise the Wagner Act. H.R. 3020, introduced by Congressman Hartley, passed the House with a provision (Section 8(a)) which treated payments by an employer to a representative as an unfair labor practice. 93 Cong. Rec. 3671, House Rep. No. 245 (80th Cong., 1st Sess., p. 29).

The Senate Committee on Labor and Public Welfare, to which H.R. 3020 was referred, reported out an original bill, S. 1126, to accomplish the same object as H.R. 3020. 93 Cong. Rec. 3613. Section 8 of this bill was a restatement of Section 8(2) of the Wagner Act, merely providing that it was an unfair labor practice for an employer to dominate, interfere with, or contribute financially to a labor organization. S. Rep. No. 105 (80th Cong., 1st Sess., pp. 12, 31, 34).

[5] Senator Taft held to identical tenets: "* * * I assert that once we permit an agent to obtain money for his own use, or for any purpose, it is affirmatively a dubious practice, an immoral practice, and unless it is used for purposes which are properly defined, it should not be permitted." 92 Cong. Rec. 5466. Later, he said (92 Cong. Rec. 5494): "[I]t [the Byrd amendment] prohibits other kinds of funds where wide-open discretion is given to the union to spend in any direction it may see fit to select."

A minority of the Committee, including Senators Taft, Ball, Donnell, Jenner, and Smith, filed their "Supplemental Views" on this bill in which they stated that the failure of the Committee bill to cover employer payments to union trust funds left a definite evil uncovered. They declared their intention to introduce amendments from the floor of the Senate; one of these was to be almost identical to the Byrd amendment as it had passed the Senate in the previous Congress. S. Rep. No. 105, *supra*, pp. 50, 52–53, 56. As promised, Senator Ball introduced [6] Section 302 as an amendment to S. 1126 when the bill was taken up for debate (93 Cong. Rec. 4677), saying (93 Cong. Rec. 4678):

> [U]nless we make sure that such [welfare] funds, when they are established, are really trust funds and are actually used for the benefit to employees specified in the agreement, *there is very grave danger that the funds will be used for the personal gain of union leaders,* or for political purposes, or other purposes not contemplated when they are established, * * *. [Emphasis added.]

The amendment was adopted by the Senate (93 Cong. Rec. 4754), won acceptance by the conference committee (House Rep. No. 510, 80th Cong., 1st Sess., pp. 24, 25, 67),[7] and was enacted as part of the Labor Management Relations Act.

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[6] The amendment was offered on behalf of Senators Byrd, George, and Smith, as well.

[7] Senators Taft and Ball were two of the four Senate members on the conference committee, p. 29.

From the Byrd amendment in the 79th Congress to the final version of Section 302 in the 80th Congress, there runs the consistent aim to reach improper payments to employee representatives. The Congressional leaders in the effort to enact Section 302 demonstrated, not once but many times, an intent to reach the kind of conduct shown by this record. They had in mind, and intended to outlaw, the case where a contribution is made to a proper welfare fund by an employer, but is received by the representative with the secret intent to use the proceeds for other and improper purposes. Indeed, the broad purpose of the Byrd amendment in the 79th Congress was to prohibit any receipt of funds which the representative intended to use for purposes other than that "for which they are supposedly established" (see *supra*, p. 22); *a fortiori*, Section 302 bans receipt of funds which the representative receives with the intent, from the beginning, of using them for his personal profit.

2. Petitioner contends (Br. 6), however, that since the money was paid by the employer with the intent of creating a welfare fund, and was deposited by petitioner in the bank in the name of such a fund, there was no violation of the statute. But under such a restrictive interpretation of the Act, which looks to the form rather than the substance of the transaction, the prohibitions in Section 302 "may be easily evaded" (*United States* v. *Ryan*, 350 U.S. 299, 305). Receipt by a representative of a direct payment from an employer, not covered by the exceptions in Section 302(c), is illegal. This prohibition could be circum-

vented, however, by designating the money as a union welfare fund and depositing it as such, even though the representative intended to, and did, treat it as his own property. The test of illegality under the Act, therefore, must be whether the representative in fact accepted the money in a good faith attempt to create a proper welfare fund, and not whether he went through the motions of doing so for ulterior purposes.

Petitioner also argues (Br. 11, note 8) that Section 302 condemns only those Acts "possessing the element of mutuality," *i.e.*, he urges that both employer and representative must violate the Act for either to be guilty.

As the Court of Appeals correctly pointed out (R. 271), "the statute does not require mutuality of guilt for the conviction of either the employer or the representative of employees. An employer would be guilty under subsection (a) if he paid or delivered any money or other thing of value to a representative of employees even though the latter repudiated the gift by returning the money or thing tendered. Likewise a representative of employees would be guilty under subsection (b) if he received money or other thing of value from an employer unless the receipt were covered in the exceptions stated in subsection (c)." The prohibition against payments by employers in subsection (a), and against receipts by representatives in subsection (b), constitute separate statutory offenses; violation of one section is not a prerequisite to violation of the other. The legislative history shows that one of the evils which Congress intended to correct was the practice

by some unions and their officials of using welfare funds for purposes other than those for which the fund was created (see *supra*, pp. 20–23)—a situation where only the representative, and not the employer, would be guilty of improper conduct.

Congress in enacting Section 302 thus applied a settled principle in criminal law that the grantor of property may have a different intent than the grantee, and that one may be guilty even though the other is not. Even in the case of payments solicited or made to influence official action, it has been recognized that there need not be any mutuality of guilt.

Thus, in *United States* v. *Waldin*, 149 F. Supp. 912, 913 (E.D. Pa.), affirmed, 253 F. 2d 551, 554 (C.A. 3), certiorari denied, 356 U.S. 973, the defendant, a deputy collector of internal revenue, solicited a payment of $20,000 from a taxpayer whose account was being examined, on the representation that he could forestall a supposedly pending prosecution of the taxpayer. The taxpayer secretly revealed the solicitation to the F.B.I. and then handed over the $20,000 to the deputy collector while agents hid nearby.[8]

The same rule is applied in cases where a trap is set to catch the giver or solicitor of a bribe. See *United States* v. *Louie Gim Hall*, 245 F. 2d 338, 339 (C.A. 2) (defendant paid $150 to an investigator of the Immigration and Naturalization Service to obtain the admission of two immigrants; several F.B.I. agents were

[8] The facts are set forth in the opinions of the lower courts, and in the Government's Brief in Opposition, No. 930, Oct. Term 1957.

watching) (the conviction was reversed by the Second Circuit on other grounds); *Lunsford* v. *United States*, 200 F. 2d 237, 239 (C.A. 10) (defendant paid $100 to a deputy collector of internal revenue for a statement that no additional tax was due; the collector had secretly notified his superior in advance); *Schneider* v. *United States*, 192 F. 2d 498, 499–500 (C.A. 9), certiorari denied, 343 U.S. 914 (defendant paid $1,500 to an Air Force lieutenant who was a salvage officer for permitting defendant to take scrap material other than that purchased by defendant on bid from the air base; the officer had notified the F.B.I. before taking the money); *Patton* v. *United States*, 42 F. 2d 68, 69 (C.A. 8) (defendants paid $500 every two weeks to prohibition agent for protection; as against a claim of entrapment, the court said, "all the officers did, if anything, was to give an opportunity to plaintiffs in error to carry out their scheme of bribery"); *Buckley* v. *United States*, 33 F. 2d 713, 716 (C.A. 6) (defendant, the state treasurer of Ohio, offered a bribe to a prohibition enforcement officer for advance information on raids and brewery inspections; the federal officer notified his superiors while pretending to acquiesce); *Scriber* v. *United States*, 4 F. 2d 97, 98 (C.A. 6) (defendant, a customs inspector, accepted money from persons who, unknown to him, were prohibition agents, to permit the importation of alcoholic beverages from Canada).

3. Contrary to petitioner's contention (Br. 12), the case was not tried or presented to the jury, and his conviction does not rest, upon any theory of embezzlement. The theory of the prosecution was not that

petitioner misappropriated property which lawfully came into his possession, but that his initial possession of the property was tainted because, as the trial court stated in denying petitioner's motion for acquittal, "right from the beginning * * * the defendant had the intention of getting full control of that money" (R. 191). Similarly, the trial court sent the case to the jury under instructions that it could convict only if it found that petitioner, in accepting the money, did not intend to create a bona fide union welfare fund (see *supra*, pp. 10–11). The jury was not charged that it could convict merely upon concluding that petitioner had misappropriated money from an existing welfare fund.

Petitioner, therefore, was tried and convicted, not for embezzlement, but for conduct amounting to larceny by trick. There is a well recognized, deeply rooted, distinction between the two crimes. The general rule was stated by this Court in *Moore* v. *United States*, 160 U.S. 268, 269–270, as follows:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Where possession is lawfully obtained by a defendant who *subsequently* converts the property to his own use, the crime is embezzlement; but where, at the very time of obtaining possession, the defendant intends to

convert the property, the crime is larceny, even though the owner, as the result of a scheme or trick, voluntarily parts with possession. This Court recognized the distinction in *Skinner* v. *Oklahoma,* 316 U.S. 535, 539, in pointing out the inequity of an Oklahoma sterilization statute which applied to persons convicted of thefts but not of embezzlements. It said, 316 U.S. at p. 539:

> There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it." *Bivens* v. *State,* 6 Okla. Cr. 521, 529, 120 P. 1033, 1036. If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. *Bivens* v. *State, supra; Flohr* v. *Territory,* 14 Okla. 477, 78 P. 565. Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose—a question for the jury under appropriate instructions. * * *

See also *Grin* v. *Shine,* 187 U.S. 181, 196; *Tredwell* v. *United States,* 266 Fed. 350, 352–353 (C.A. 4), certiorari denied, 253 U.S. 496.

Although there must be a taking against the will of the owner, or a trespass to his possession to show larceny, the requirement is established where possession is given up because of trickery. In such a case there is no real consent and the taking of possession is wrongful. *Ackerson* v. *United States,* 185 F. 2d 485,

489 (C.A. 8); *Stewart* v. *United States,* 151 F. 2d 386, 388 (C.A. 8); *People* v. *Edwards,* 72 Cal. App. 102, 236 Pac. 944, 948.

In line with this reasoning, it has been held that, where property is entrusted to a defendant for a special purpose and he takes it with the intent then and there to use it, not for the purpose for which it was intended, but for his own use, his crime is larceny and not embezzlement. *Means* v. *United States,* 65 F. 2d 206, 207 (C.A.D.C.); *Tredwell* v. *United States, supra; People* v. *Otterman,* 154 Cal. App. 2d 193, 316 P. 2d 85, 91; *People* v. *Bartges,* 126 Cal. App. 2d 763, 770, 273 P. 2d 49, 52–53; see *Graham* v. *United States,* 187 F. 2d 87, 88–89 (C.A.D.C.), certiorari denied, 341 U.S. 920; *Beck* v. *United States,* 66 F. 2d 203, 204 (C.A.D.C.); *People* v. *McCabe,* 60 Cal. App. 2d 492, 496, 141 P. 2d 54, 57; Annotation, *Distinction Between Larceny and Embezzlement,* 146 A.L.R. 532.

In *Means* v. *United States, supra,* for example, the defendant persuaded Mrs. McLean to give him $100,000 on the false representation that the money would be used to ransom the Lindbergh baby. As a matter of fact, the defendant, at the time he received the money, secretly intended to, and later did, convert the money to his own use. The Court of Appeals answered the defendant's contention that he had committed embezzlement, if anything, by saying (65 F. 2d at 207):

> [O]ne who obtains money from another upon the representation that he will perform certain service therewith for the latter, intending at the time to convert the money, and actually con-

verting it, to his own use, is guilty of larceny * * * [citing authorities].

Petitioner's reliance (Br. 9) on legislation and legislative proposals in the 85th Congress dealing with embezzlement and misuse of union welfare funds is beside the point. For petitioner was not convicted because he embezzled or misappropriated union welfare funds, but because he prevented a valid welfare fund from coming into existence. When petitioner accepted the checks from the employers, he then and there took for his own use funds which were intended by the employers for union welfare purposes. Acceptance of the money in such circumstances violated Section 302.

II. THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION

In Point I, we have shown that receipt of money or anything of value by an employees' representative, ostensibly for a union welfare fund, but in fact intended by him to be used for his personal purposes, violates Section 302. In this point, we shall show that the evidence justified the jury in concluding that, when petitioner accepted the $15,000 from the employers, he did so with the intent of using the money himself, and therefore did not accept it for the purpose of creating a bona fide union welfare fund.

As set forth in the Statement (*supra*, pp. 9–10), the jury was charged that to convict it had to find that petitioner had a different purpose in accepting the $15,000 than the employers' purpose, in turning it over to him, of creating a proper union welfare fund. Since there was no question that the employers' pur-

pose was to establish the welfare fund contemplated by the collective bargaining agreement, the jury necessarily concluded that petitioner received the money with the intent of using it for his personal purposes and not for a proper welfare fund.

The evidence supports the verdict on that basis. Petitioner's conduct before, during, and after the receipt of the money was relevant to show his intent at the moment of receipt. As the Court of Appeals correctly held (R. 271), such conduct justified the jury in concluding that petitioner merely pretended to receive the checks for a proper welfare fund and that, at the moment of receipt, he took the checks not for the fund but for himself.

Petitioner's official position as president of the union enabled him to obtain the checks by purporting to accept them for the employees' welfare fund. Before the employers delivered these checks to petitioner, they and he, as representative of the employees, had reached a collective bargaining agreement providing for the $15,000 employer contribution to a welfare fund. It had been agreed that petitioner was to represent the union in expending the fund and that Mr. Goyco, a person well-known to petitioner as a negotiator for the companies, was to represent the employers. The previous contract between the employers and the union, which was expiring at the time, had also provided for the establishment of a welfare fund, in the same amount, and that fund had been disbursed under joint control. In fact, the joint bank account which had served as a repository of the previous welfare fund pending disbursement was still

in existence; it was intended to be the repository of the new fund; and petitioner had served as the union's representative in spending the previous fund. It was therefore not strange that the employers would deliver the checks to petitioner when he explained that he wanted to show them to the union members, even though the deposits for the previous year's fund had been made directly by the employers.

The jury was warranted in concluding that petitioner never accepted the money for the purpose for which the employers gave it. Although petitioner obtained control of the checks by telling the employers that he wanted to show them to the union membership at a meeting to be held the evening of the day on which the contract was signed, the jury could well believe that petitioner made this claim for the purpose of obtaining sole physical possession of the checks so that he could deposit them in an account which he alone would control. In fact, there was no evidence that such a meeting was held.

Petitioner's intent at the time of receipt is further illuminated by his subsequent conduct. He did not deposit the checks to the welfare fund account which was in existence, and then misuse the money; he immediately opened an account which, while in the name of the welfare fund, was one over which he had complete personal control. He assured his personal control—free from interference, not only by the employers, but by his own union—by using a spurious union resolution. He tightened his control by expelling the Secretary from the union (see *supra*, fn. 2, p. 8) and demanding the right to expend union funds

on his own signature. He carried his initial intent to its logical conclusion by expending the welfare money for his own personal use. Finally, when the employers discovered his failure to carry out the agreement for joint control of the fund, he closed out the account and transferred the remaining money to another bank, over which account he again had sole control and which he continued to use for personal purposes.

The jury was entitled to infer from this evidence of petitioner's whole course of conduct, from the signing of the contract onward, that he never intended to treat these checks and their proceeds as a welfare trust fund—the only purpose for which they were given. From the moment he schemed to obtain sole possession of the checks until the time when the residue of the money was commingled with general union funds so as to be unrecognizable, petitioner did nothing with the checks and their proceeds which did not better enable him personally to dispense them for his own purposes.

The evidence of what petitioner did with the money after he got control of the checks by a trick and deposited them in an account over which he had sole control was properly admitted as bearing on his intent at the time he took them. Except where a defendant makes admissions, intent must necessarily be proved by circumstantial evidence. Petitioner's subsequent use of the money for personal expenditures indicated that his whole course of conduct was not inadvertent—that, for example, the deposit of the checks in an account other than the old welfare fund account was not

merely a matter of convenience, but part of a consistent scheme. As the Court of Appeals stated (R. 271): "The competency of the evidence of his withdrawals from the fund for his personal expenses to show his complete and sole control over the fund is too obvious to call for demonstration or the citation of authorities".

Whether complete control was petitioner's purpose at the moment he gained possession of the checks was an issue the jury was called upon to decide. The evidence concerning his disbursements was therefore properly admitted on the issue of the intent with which petitioner received the money. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Wood* v. *United States*, 41 U.S. 342, 360; *Herman* v. *United States*, 220 F. 2d 219, 224 (C.A. 4), affirmed, 227 F. 2d 332, certiorari denied, 350 U.S. 971; *Green* v. *United States*, 188 F. 2d 48 (C.A.D.C.), certiorari denied, 341 U.S. 955; *Todorow* v. *United States*, 173 F. 2d 439, 447, certiorari denied, 337 U.S. 925; *King* v. *United States*, 144 F. 2d 729, 732–733 (C.A. 8), certiorari denied, 324 U.S. 854; see Underhill, *Criminal Evidence* (5th ed.), § 788, p. 1800:

> Where the alleged fraudulent transaction is at all complicated, it is competent to prove, not only the facts constituting the transaction itself, but also all facts and circumstances involved in the steps preliminary thereto, and all facts which tend to show the course of dealing between the parties before and after the date of the offense laid in the indictment. Wide latitude is allowed. All available information should be received and no circumstance should

be excluded which would throw, or tend to throw, any light upon the intent of the parties, or upon the falsity of the representations.[9]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY 1959.

[9] Petitioner argues (Br. 16–17) that there was a fatal variance between the allegation in the indictment (as particularized) that he received the $15,000 on February 24, 1953, and the proof that he improperly spent part of the fund during March and April of that year. This issue, however, is not covered by the single question presented in the petition for certiorari, and which the petition argued, namely, whether Section 302 covers "the area of misappropriations from union welfare funds" (Pet. 2; see Pet. 6–8).

In any event, the contention has no merit. The prosecution proved that, as alleged, petitioner received the $15,000 on February 24, 1953, in the form of two checks. The evidence of his subsequent misconduct was introduced to show his intent when he accepted the checks.

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